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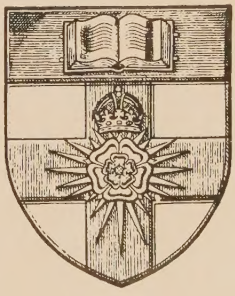

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1897.

THE

LAW REPORTS

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AND IN

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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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ADDENDUM.

Since the publication of the report of *Finlay* v. *Darling* (pp. 723–4) the reporter of *In re Bendy* ([1895] 1 Ch. 109) has again verified the facts stated in the latter case by a further examination of the two affidavits used on the hearing of the summons. The facts as stated in the report are absolutely correct, and no other circumstances were relied upon in the arguments and judgment beyond those so stated.

F. P.

ERRATA.

Page	*Line*	*For*	*Read*
186	15	*McIntyre*	*McEntire.*
369	2	*Mallinson*	*Malleson.*
638	34	transpose word "by" from end of line to beginning of line.	

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

ERNEST *v.* LOMA GOLD MINES, LIMITED.

C. A. 1896 Nov. 4, 10.

[1896 E. 675.]

Company—Meeting of Shareholders—Special Resolution — Show of Hands—Proxies—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51 (1)—*Blanks in Proxies—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 80.

At a meeting of the shareholders of a company the articles of which allow voting by proxy, the chairman, in ascertaining the number of votes given on a show of hands, must count the vote of each person who holds proxies as a single vote, and not count a vote for each of the members whose proxies he holds.

Decision of Chitty J., [1896] 2 Ch. 572, affirmed.

In re Bidwell Brothers, [1893] 1 Ch. 603, overruled.

A notice convening an extraordinary general meeting to confirm a special resolution was accompanied by a circular from the secretary and directors with a proxy attached, asking for the return of the proxy in support of the resolution; by a printer's error the date of the meeting was left blank in the proxy. Several of the members executed and returned their proxies (which were duly stamped) without filling up the blanks, which were filled up by the secretary before the proxies were lodged with the company:—

Held, by the Court of Appeal, affirming the decision of Chitty J., that these proxies were valid within the provisions of the Stamp Act, 1891, s. 80.

THIS was an appeal by the plaintiff from a decision of Chitty J. (2), who held that at a special general meeting of

(1) The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51: "A resolution passed by a company under this Act shall be deemed to be special

(2) [1896] 2 Ch. 572.

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shareholders in June, 1896, the chairman was right in refusing on a show of hands to count the votes of all the members for whom a member present held proxies, and that at the confirmatory meeting in July he had rightly allowed proxies in which the date and hour of the meeting had been filled in by the secretary after the proxies had been signed and returned to the company.

The company had a nominal capital of 300,000*l.* in 300,000 shares of 1*l.* each. Art. 56 provided that five shareholders, each of whom must be present in person or by proxy, should be required to constitute a quorum at a general meeting. By art. 60, at any general meeting a motion was to be decided in the first instance by a majority of members ascertained by show of hands, and, unless a poll was demanded by at least three members holding at least one-tenth of the shares of the company, a declaration by the chairman that a resolution had been carried, and an entry to that effect in the books was to be sufficient evidence of the fact. By art. 62, every member was to have one vote for each of his shares. Art. 66 allowed voting by proxy; and 67 provided that proxies must be members, and that all instruments appointing proxies must be deposited in the

whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company: In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company."

company's office at least forty-eight hours before the time of meeting.

On June 3, 1896, an extraordinary general meeting was held at which fourteen shareholders were present. On a show of hands, twelve voted for the resolution, the plaintiff and one other against it. The plaintiff held proxies for 431 shareholders holding in all 102,000 shares. The chairman declared the resolution carried, and refused a poll on the ground that the plaintiff was not supported in his demand for it by two other members present.

The meeting to confirm the resolution was held on July 1. A poll was demanded, and on its being taken there was a majority of 16,704 votes in favour of the resolution.

The plaintiff objected to a number of proxies used in favour of the resolution to an extent more than sufficient to wipe out this majority. Notice of the confirmatory meeting was duly sent to all the members. Accompanying this notice was a circular signed by the secretary and emanating from the chairman and directors with a form of proxy to be returned, and giving reasons why the proxies should be sent as requested by the directors. The proxy was in the usual form except that it omitted to state the day and hour of meeting. Various proxies were returned signed by the shareholders, but without inserting the day and hour of meeting. The secretary filled up these particulars before lodging the proxies according to art. 67.

The plaintiff brought his action, insisting that the first resolution was not carried, for that the chairman ought to have treated the plaintiff as having 432 votes, and that the confirmatory resolution was not validly passed, for that the proxies filled up by the secretary did not satisfy the requisitions of the Stamp Act, 1891, s. 80.

Chitty J. decided against the plaintiff on both points: see the report below (1), where a fuller statement of the facts is given. The plaintiff appealed.

Ashton Cross, for the appeal. The question is whether proxies are to be taken into account on a show of hands.

(1) See [1896] 2 Ch. 572.

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In this company proxies are allowed and greater weight than usual is given to them, for by art. 56 proxies are taken into account in ascertaining whether there is a quorum. The Companies Act, 1862, s. 51, provides for a special resolution being carried by a specified majority of the members present "in person or by proxy" at the meeting. If a member gives a proxy and the proxy attends, the member who gives it is present by proxy. He therefore must be taken into account in considering whether the resolution is carried by the requisite majority of the members present. Here, if account is taken of the persons for whom the plaintiff held proxies, the resolution of June 3 was not carried. Chitty J. refers to the remark of Mr. Palmer (Company Precedents, 6th ed. vol. i. p. 338), that the mode of reckoning votes for which I contend is foreign to common practice, and may in some cases involve great inconvenience; but that learned writer goes on to observe that it agrees best with the words of the Act. I must admit that the chairman was right in refusing a poll, for a poll cannot be demanded by a proxy: *Reg.* v. *Government Stock Investment Co.* (1); *In re Haven Gold Mining Co.* (2) The decision of Vaughan Williams J. in *In re Bidwell Brothers* (3) is express in my favour; and in that case his Lordship deals with *In re Caloric Engine and Siren Fog Signals Co.* (4), which makes the other way. Unless the effect I contend for is given to proxies a small minority might govern the company, for in many mining companies nearly all the shareholders are abroad and cannot attend in person. What the statute lays stress on is the being present, and it expressly says present in person or by proxy. Vaughan Williams J. thought that *In re Horbury Bridge Coal, Iron and Waggon Co.* (5) did not apply, and there is nothing in it that makes against my contention.

Byrne, Q.C., and *E. W. Stock*, for the company.

[LINDLEY L.J. Can we say that the requisitions of the Companies Act, 1862, s. 51, have been satisfied?]

We submit that the Court can. The Legislature knew that

(1) (1878) 3 Q. B. D. 442.
(2) (1882) 20 Ch. D. 151.
(3) [1893] 1 Ch. 603.
(4) (1885) 52 L. T. (N.S.) 846.
(5) (1879) 11 Ch. D. 109.

there were two modes of voting—by show of hands or at a poll. The Act says nothing in words about show of hands; but s. 51 talks of a poll being demanded, and of a resolution being carried without a poll being demanded, evidently assuming that in the first instance the votes would be taken in the only other known way—by show of hands, i.e., a show of hands taken in the usual well-known way. It is against the nature of a show of hands that one hand should count for more than another. The mode proposed on the other side would not secure the expression of the will of the company more than the common mode; for, if votes were taken according to the appellant's contention, a person holding fifty proxies from fifty holders of one share each would on a show of hands outvote a holder of one proxy for 30,000 shares. A man who holds up his hand holds it up in respect of all his voting power. If a vote is to be given for each proxy, why not give the man his proper voting power as in a poll? It is hard to understand the principle of *In re Bidwell Brothers* (1), and it is directly opposed to the earlier decision of Kay J. in *In re Caloric Engine and Siren Fog Signals Co.* (2) The principles laid down in *In re Horbury Bridge Coal, Iron and Waggon Co.* (3) really cover the case, though the precise point was not decided. That case shews that the old common law mode of show of hands is a proper mode of taking the first vote.

Ashton Cross, in reply.

Cur. adv. vult.

Stock then called attention to the fact that the other point decided by Chitty J. had not been mentioned.

Ashton Cross, for the appellant. The provisions of the Stamp Act, 1891, s. 80, are not complied with. That section requires that every proxy shall specify the day of meeting, and the proxies in question were incomplete when they left the hands of the members. They were not, therefore, such instruments as the Act requires, and the votes given under them are void.

Stock, for the company, was not called upon.

(1) [1893] 1 Ch. 603. (2) 52 L. T. (N.S.) 846.
(3) 11 Ch. D. 109.

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LINDLEY L.J. It is not disputed that the instruments in question were duly stamped. They were sent to the secretary for the purpose of being used at a particular meeting, and the secretary had implied authority to supply the accidental omission of the day and hour of that meeting before they were lodged. There is nothing in the Act to render void the votes given under them. We will consider the other point.

A. L. SMITH L.J. concurred.

1896. Nov. 10. LINDLEY L.J. delivered the judgment of the Court (Lindley and A. L. Smith L.JJ.) upon the point reserved. This is an appeal from a decision of Chitty J. (1) The question raised by the appeal is how absent members of a registered company are to vote at a meeting called under s. 51 of the Companies Act, 1862, when no poll is demanded. The question is important, because different views have been taken by different judges of the High Court. Before referring to the decisions it is necessary to read s. 51, on the construction of which the question really turns. [His Lordship read the section.]

It will be observed that this section contemplates cases in which a poll is demanded, and cases in which no poll is demanded. A valid resolution may be carried without a poll as well as with a poll. The section does not say how votes are to be given or counted when a poll is not demanded. The section is framed upon the assumption that the mode of voting in such a case is well known, as in truth it was and is—namely, by show of hands—i.e., by counting the persons present who are entitled to vote and who choose to vote by holding up their hands. We can find nothing in the section to alter or to exclude this well-known mode of conducting business, nor so far is there any controversy. The controversy arises in this way. Absent members who have appointed proxies vote by those proxies; but unless a poll is demanded the person present is only counted once, however numerous may be the persons whom he represents. Such is admitted to

(1) [1896] 2 Ch. 572.

be the common practice. But it is contended that the practice in this respect is inconsistent with s. 51, and that when that section applies, as it does in this case, each absentee whose proxy is present and votes is entitled to be treated as present himself and as holding up his hand, so that on a show of hands each person present and entitled to vote and voting ought to be counted not once only, but once for every person whom he represents. It is not contended that the number of votes which each absentee could give on a poll is to be counted: the contention is that each absentee who has given a proxy to a person who is present and votes is to be counted as a member present and holding up his hand. This contention is based on the words, "present in person or by proxy." Absentees, it is contended, are present by their proxies, and must, therefore, be counted as persons present if those proxies vote.

This ingenious argument, however, fails to give sufficient effect to the words, "entitled according to the regulations of the company to vote." The regulations of each company must therefore be regarded. The regulations of every company are, however, themselves framed with reference to ordinary business habits, and are based upon the assumption that business will be conducted in the ordinary way. Sect. 51 of the Act is intended to be worked with the regulations contained in Table A in the case of companies having no other regulations, and Table A impliedly authorizes voting by show of hands in the ordinary way if no poll is demanded (see art. 42); and it also authorizes voting by proxy (art. 48); but proxies must be members of the company (art. 49). The articles of association of the present company exclude Table A, but contain similar provisions as regards voting, and also an express provision (60) that "at any general meeting every motion made and submitted shall be decided, in the first instance, by a majority in number of the members to be ascertained by a show of hands." This express provision is not in Table A; but, in our opinion, it is implied although not expressed. Sect. 51 of the Act does not render this article inapplicable to general meetings called to pass special resolutions. The section and the article must be read together; and so read the argument of the appellant renders it

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necessary to say that the effect of s. 51 is to introduce a mode of voting by show of hands which is quite contrary to ordinary business habits, and which no one has ever known adopted in practice. Absent members, who vote by one and the same proxy when no poll is demanded, vote not separately as if they were individually present, but as an aggregate; their proxy, if a member, holding his hand up and so giving one vote, but only one for himself and them. Absentees, if they are to be regarded as present by proxy before a poll is demanded, vote in this way and no other. The above mode of voting and no other is that which is contemplated by the Legislature when no poll is demanded, as is shewn by Table A; and this mode and no other is consistent with the articles of this company. This was Chitty J.'s view. The same view was taken by Kay J. in *In re Caloric Engine and Siren Fog Signals Co.* (1), and by the Court of Appeal in *In re Horbury Bridge Coal, Iron and Waggon Co.* (2) It is true that the only point decided in this last case was that on a show of hands shares ought not to be counted. No one suggested that absentees should be counted as present; but the observations of Sir George Jessel on the mode of voting by show of hands are clearly against the propriety of so counting them. In *In re Bidwell Brothers* (3) Vaughan Williams J., however, decided that on a show of hands absent members entitled to vote by proxy ought to be counted as present if their proxy is himself present and votes. We agree that this is true if the proxy is a non-member and represents only one person—namely, the absentee for whom he votes. The proxy's vote must be counted, and that vote is in effect the vote of the absentee. But to hold that on a show of hands a proxy has more than one vote is to introduce a mode of voting never heard of in practice, and not, in our opinion, required by law. Sect. 51 of the Companies Act, 1862, is a reproduction of s. 34 of the Joint Stock Companies Act, 1856; and if Vaughan Williams J.'s decision is right, a practice which has prevailed ever since 1856, if not for even a longer period, will have been improper. Such

(1) 52 L. T. (N.S.) 846. (2) 11 Ch. D. 109.
(3) [1893] 1 Ch. 603.

a conclusion makes it necessary to examine the grounds on which it is based with great care and some suspicion; and for the reasons above stated we have come to the conclusion that the decision in *In re Bidwell Brothers* (1) is erroneous and ought not to be followed. The appeal must be dismissed with costs.

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Solicitors: *W. T. Hart; Powell & Burt.*

H. C. J.

In re COSH'S CONTRACT.

C. A. 1896 Nov. 13.

[1896 C. 362.]

Covenant against Assignment without Licence—Licence to Assign—"Fine or Sum of Money in the nature of a Fine"—Deposit by way of Security—Conveyancing and Law of Property Act, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

A building lease, which had been granted under a building contract relating also to other property, contained an absolute covenant not to assign without licence. The lessors on being applied to for a licence to assign refused to grant it unless the lessee would deposit with them 2000*l.* as a further security for the performance by him of the unperformed part of the building contract:—

Held (affirming the decision of Stirling J.), that the deposit with the lessors of a sum of money which, if the lessee performed the building contract, would revert to him, was not payment of a "fine or sum of money in the nature of a fine" within the meaning of the Conveyancing and Law of Property Act, 1892, s. 3, and that the lessors might lawfully require such a deposit as a condition for granting the licence.

In 1893 the trustees of St. Giles and St. Luke's Joint Parochial Charities offered to accept tenders for the pulling down and rebuilding certain houses in the City of London known as Nos. 1 to 23, New Union Street, and Nos. 19 and 21, Moorfields. No. 21, Moorfields, was a public-house known as The Five Bells. The conditions on which the offer was made provided for the erection of new buildings, and included the following stipulations: No. 8. "The contractor is to give such security for due performance of these conditions as the said trustees shall require and approve of, and within such limited time as

(1) [1893] 1 Ch. 603.

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they shall appoint, in default whereof or of the due performance of these conditions or any of them it shall be in the power of the said trustees, by an order in writing made for that purpose and signed by their clerk, to annul and make void everything herein contained and to resume the possession of the said ground and premises, and to let the same to any other person or persons if they shall think fit." Clause 9 provided that when the buildings were completed, or so soon after they were covered in as the trustees should approve, a lease should be granted to the contractor for eighty years from Michaelmas, 1893, at the rent of 1000*l.* for the first three years, and for the residue of the term at the tendered rent. The lease was to contain such covenants and conditions as were contained in a draft form of lease deposited at the office of the trustees' solicitors.

The draft form of lease contained an unqualified covenant by the lessee that he would not assign, underlet, or otherwise dispose of the premises or any part thereof, except by way of mortgage or by will only, without the previous consent in writing of the lessors.

In May, 1893, Cosh offered to take the premises on the above terms at a rent of 1000*l.* for the first three years and 2075*l.* for the residue of the term, and this offer was accepted.

On September 27, 1893, the solicitors of the trustees by letter informed Cosh that the security required would be the immediate deposit of 1000*l.* with the trustees, and the deposit of a further sum of 1000*l.* before pulling down 19, Moorfields, and The Five Bells.

On December 8, 1893, the trustees apportioned the ground-rent as follows: on The Five Bells, 300*l.* a year; on 19, Moorfields, 150*l.* a year; and on the property in New Union Street pro ratâ, an amount sufficient to make the whole ground-rent up to 2075*l.*

In January, 1895, after much disputing between the parties, an arrangement was made by which a Mr. Finch undertook to guarantee the rebuilding of The Five Bells, and the performance of the contract as to that house and 19, Moorfields, and to take up the leases of those two properties at the ground-rents

of 300*l.* and 150*l.* respectively. The Five Bells was accordingly pulled down and rebuilt. Mr. Cosh and Mr. Finch contracted for the sale of the lease of it for 12,500*l.* The licence of the trustees to the assignment being necessary, they insisted on the deposit of a further sum of 2500*l.* as security for the performance of the remaining part of the contract, a demand which they afterwards reduced to 2000*l.* The sale was completed and the 2000*l.* paid under protest, the solicitors of the trustees giving a receipt in this form: "On behalf of the Joint Estate Trustees and the Joint Parochial Charities of St. Giles and St. Luke we acknowledge the receipt this day, the 7th January, 1896, of 2000*l.* as further security for the performance of the contract of May 23, 1893, between the trustees and R. L. Cosh, and that the same was paid under protest and without prejudice to the rights of the parties under such contract."

Cosh then took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the trustees were not entitled to retain by way of security the 2000*l.* paid by Cosh, and that the trustees might be ordered to repay it. The summons came before Stirling J.; and as the trustees claimed to retain the 2000*l.* as security apart from the contract of May, 1893, it was agreed that the judge should have power to decide that question as if an action had been brought by Cosh for the return of the 2000*l.* Stirling J. held that the trustees had exhausted their power of requiring security under the contract, but that they could require this additional security as a consideration for granting a licence to assign, a deposit not being in His Lordship's opinion a "fine or sum of money in the nature of a fine," so as to be forbidden by the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3.

Cosh appealed.

Warrington, Q.C., and *Dibdin*, for the appeal. We contend that the further deposit was asked for under clause 8 of the contract, and that under it the claim fails, and we are not remitted to the Conveyancing and Law of Property Act of 1892. Stirling J. was of opinion that the trustees were not entitled to further security under the contract. Then we say, that if it

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was asked for as a consideration for a licence to assign, it was illegal under the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3. Stirling J. thought that the receipt of this sum did not come under the prohibition of receiving a "fine or sum of money in the nature of a fine" for granting a licence, because it was not money paid out and out, but would come back to the depositor if and when he performed all the conditions of his contract. But to say that it is not within the prohibition is too narrow a view of the section. Its object was that the lessor should have no power to compel the lessee to purchase a licence. The trustees are stakeholders of this sum: *Strachan* v. *Universal Stock Exchange* (1); and a stakeholder cannot be called upon to pay interest even when he has made interest: *Harington* v. *Hoggart*. (2) The trustees, therefore, receive a direct pecuniary benefit from having this money in hand, and this makes the payment one in the nature of a fine; if not, the prohibition of the statute can readily be eluded.

[Lord Russell C.J. If in any case the Court could see that the object of the lessor was to obtain that pecuniary benefit, that would be an important consideration.]

It has never been decided whether a lessor may stipulate for a pecuniary consideration for granting a licence. Woodfall (Landlord and Tenant, 15th ed. 695) thinks that he can, but intimates that perhaps a prohibitive consideration might be illegal. Here the lessors are impounding all the profit of the lessee from the part of the contract which he has carried out, and so making it impossible for him to go on.

Buckley, Q.C., and *John Henderson*, for the respondents, were not called upon.

Lord Russell of Killowen C.J. This case came before the Court on a summons under the Vendor and Purchaser Act, 1874; but as rights other than those arising under the contract had to be considered, it was agreed that it should be decided as if an action had been brought by the lessee for money had and received. If the money was paid under protest without good consideration the defendants have no right to retain it, and the

(1) [1895] 2 Q. B. 697. (2) (1830) 1 B. & Ad. 577.

plaintiff must succeed; if it was paid for good consideration he must fail.

I need not go through the facts in detail. By the original contract in May, 1893, Cosh undertook to pull down the buildings on two properties, and to erect other buildings. The only stipulations which need be noticed are conditions 8 and 9. By condition 8 Cosh was to give such security for the due performance of the conditions as the trustees should require, and within such limited time as they might appoint. In September, 1893, the trustees through their solicitors announced that the security required would be an immediate deposit with the trustees of 1000*l.*, and a further deposit of 1000*l.* before pulling down the buildings on the Moorfields property. In January, 1895, the security was varied, an arrangement being made by which a Mr. Finch undertook with the trustees to guarantee the rebuilding of The Five Bells, and the performance of the rest of the contract so far as it related to the Moorfields property. We agree with Stirling J. that they might so require security under clause 8 if the contract had not been in this respect exhausted, and that the trustees after this time had no right under the contract to require any further security. The Five Bells was rebuilt, and Finch and Cosh contracted to sell their leasehold interest for a considerable sum, which would enable them to pay some arrears of rent due in respect of the property and leave a large surplus. Before they could complete the sale, it was necessary, in order to enable them to make a legal title to the assignee, that they should have a licence from the trustees to assign. The trustees made it a condition of granting this licence that 2000*l.* more should be deposited with them as a security for performance of the agreement of May, 1893, so far as it remained unperformed. On the whole correspondence I come to the conclusion that they demanded this as a condition of granting the licence, not as a security to which they were entitled under the original agreement. Was it legal to impose such a condition? Sect. 3 of the Conveyancing Act of 1892 (55 & 56 Vict. c. 13) plainly enacts that a covenant not to assign without licence shall be read as containing a provision that no fine or sum of money in

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the nature of a fine shall be "payable" for granting a licence. Now, was this a fine or sum of money in the nature of a fine payable in respect of the licence? The section points at a sum of money which is to go irrevocably into the pocket of the lessor. Here there was only a deposit, not a payment which transfers the title to the money and enables the payee to hold it as his own. If the lessee performs the contract the money deposited will come back to him. We conclude, then, that the sum so paid is not a fine nor a sum of money in the nature of a fine. The appeal must be dismissed.

Lindley L.J. I agree, and have nothing to add.

A. L. Smith L.J. concurred.

Solicitors: *A. A. Timbrell; Baylis & Pearce.*

H. C. J.

In re STREATHAM AND GENERAL ESTATES COMPANY.

CHITTY J.
1896
Nov. 19.

Company—Liquidation—Debentures—Property both Present and Future—Uncalled Capital.

A company, having power by its memorandum and articles to borrow on the security of any of its property both present and future, including its uncalled capital, issued debentures charging the undertaking and all its "property whatsoever and wheresoever both present and future" with payment of the sums advanced. The company subsequently went into liquidation:—

Held, that the addition of the word "future" did not extend the meaning of the term "property" as defined by *Stanley's Case*, (1864) 4 D. J. & S. 407, and that the debentures were a charge only on the property of the company as it existed at the commencement of the liquidation, and did not include the then uncalled capital.

ADJOURNED SUMMONS.

This was an application by the liquidator of the Streatham and General Estates Company, Limited, which raised the question whether certain debentures issued by the company in August, 1890, created a charge on the uncalled capital of the company.

The facts, so far as material for the purposes of this report, were as follows:—

The company was authorized by its memorandum and articles of association to borrow on a charge of any of its property both present and future, including its uncalled capital.

In August, 1890, the company issued a series of debentures for 14,445*l.*, which charged "the undertaking and all its property whatsoever and wheresoever both present and future" with payment of the amount advanced.

In September, 1890, the company went into liquidation. The assets now in the hands of the liquidator consisted solely of money received from the balance of uncalled capital called up and got in by him during the course of the liquidation; and the

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question now argued was, whether the wording of the debentures was sufficient to include in the security the uncalled capital.

R. E. Moore, for the liquidator. The power to charge its property, given to this company by its memorandum and articles, does not authorize a charge on the unpaid capital: *Bank of South Australia* v. *Abrahams* (1); such a charge would prevent the directors from freely exercising the discretion given them as to calling up capital: *Stanley's Case*. (2)

[He was stopped.]

Peterson, for the debenture-holders. This company is expressly authorized to borrow on a charge of any of its property both present and future, including its uncalled capital. These debentures, therefore, do include uncalled capital: *Howard* v. *Patent Ivory Manufacturing Co.* (3) Uncalled capital may not be property of the company until it has been received, but when it has been received it is property of the company: it is its future property; the word "future" helps this construction, and gives us a charge: *Page* v. *International Agency and Industrial Trust.* (4)

[CHITTY J. The judgment there does not say that future property will include uncalled capital: the word in that case was "assets."]

We are entitled to have this money, now in the hands of the liquidator, applied in payment of these debentures in priority to the unsecured creditors: *In re Pyle Works* (5); and that was approved in *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (6) [*Jackson* v. *Rainford Coal Co.* (7) was also cited.]

Rowden, for the trustees of the debenture deed.

Moore, in reply. These debentures were only a charge on the "property" of the company as it existed at the date of the winding-up: *In re Colonial Trusts Corporation*. (8) There is no difference between "property" and "future property."

(1) (1875) L. R. 6 P. C. 265.
(2) 4 D. J. & S. 407.
(3) (1888) 38 Ch. D. 156.
(4) (1893) 68 L. T. (N.S.) 435.
(5) (1890) 44 Ch. D. 534.
(6) [1895] A. C. 244.
(7) [1896] 2 Ch. 340.
(8) (1879) 15 Ch. D. 465.

CHITTY J. This company, by its memorandum and articles of association, had authority to borrow on a charge of its uncalled capital, and the question I have to decide is whether it has exercised that power to its fullest extent by means of these debentures, which were issued in August, 1890, and which purport to charge "the undertaking and all the property whatsoever and wheresoever both present and future" with payment of the sums advanced: what I have to consider is whether these words are sufficient (having regard to the authorities on the subject) to include what the company might have included by apt words, namely, its uncalled capital. The term "property" in charges of this kind has been the subject of much discussion: the leading authority on the subject is *Stanley's Case* (1), which was afterwards approved by the Privy Council in *Bank of South Australia* v. *Abrahams* (2), where the judgment was delivered by James L.J.; and again in *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (3), a very recent authority.

In *Stanley's Case* (1) there was a power to borrow on the security of the "funds or property of the society," and there seems to be no doubt on reading the judgments in that case that the property charged was not to be confined to the property of the company existing at the time when the charge was created. Turner L.J. in that case says, in a passage that is often cited (4): "What is the nature of the unpaid calls due from the subscribers to companies of this description? They are property, not of the society immediately, but which may be called up by the directors of the society at their discretion." And there were other words in that case which were held to confine the meaning of the word "property" so as to prevent its including uncalled capital. No doubt the addition of other words such as "assets" or, as was said in *Bank of South Australia* v. *Abrahams* (5), and repeated in *Newton's Case* (6), "apt and proper words or a sufficient context," may be sufficient to enlarge the power of the company to charge or extend the meaning of the word "property." Are there such words or

(1) 4 D. J. & S. 407.
(2) L. R. 6 P. C. 265.
(3) [1895] A. C. 244.
(4) 4 D. J. & S. 414.
(5) L. R. 6 P. C. 271.
(6) [1895] A. C. 247.

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context in the present case? In my opinion there are not. When one considers that according to the decision of Jessel M.R. in *In re Colonial Trusts Corporation* (1) the word "property" in debentures of this kind includes present and future property of the company down to the commencement of the winding-up, but not capital then uncalled, it seems to me to be an extraordinary proposition to say that because you find the words "present and future property" in the deed creating the charge you must make it include that which by force of the term "property" itself is not included: to do this would be altering the meaning of the word "property." I hold, therefore, that the addition of the word "future" does not in any way extend the meaning of the word "property," as defined by the authorities. The result, therefore, is that in my opinion these debentures only create a charge on the property of the company as it existed at the commencement of the winding-up, and that they do not include the then uncalled capital.

Solicitors: *C. H. T. Wharton; J. D. Arthur; H. C. Godfray.*

(1) 15 Ch. D. 465.

W. C. D.

SIMMONS *v.* BLANDY.

NORTH J.

1896

Dec. 5.

[1896 S. 3404.]

Practice—Mortgage—Foreclosure Action—Form of Judgment.

In a foreclosure action in which a receiver of rents and profits had been appointed :—

Held, that the judgment ought to direct that in taking the account the plaintiff should be charged with the amount (if anything) paid into court by the receiver, and such a sum as should be in the receiver's hands at the date of the certificate, and with such a sum (if any) as the plaintiff should submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order for foreclosure absolute.

Form in Seton's Judgments, 5th ed. vol. iii. p. 2142, varied.

MOTION by the plaintiffs in a foreclosure action for judgment in the terms of some proposed minutes, the defendants having made default in appearance.

A receiver of the rents and profits of the mortgaged property had been appointed.

The proposed minutes directed an account of what was due to the plaintiffs under and by virtue of the mortgage, and for their taxed costs of the action, and that "in taking such account what (if anything) the plaintiffs shall have received from the defendants under the aforesaid judgment" (that is, judgment on the defendants' personal covenant for principal and interest) "is to be deducted and also what (if anything) shall have been paid into court by the receiver appointed in this action and such sum (if anything) as the plaintiffs shall submit to be charged with in respect of rents and profits in the receiver's hands at the date of the chief clerk's certificate or to come into his hands prior to the order for foreclosure absolute, and the balance due to the plaintiffs is to be certified."

Joseph Tanner, for the plaintiffs. The proposed minutes are in the form given in Seton's Judgments, 5th ed. vol. iii. p. 2142 (Addenda). This form was approved and adopted by

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Kekewich J. in *Barber* v. *Jeckells* (1) and *Lusk* v. *Sebright* (2), and by Chitty J. in *Christy* v. *Godwin.* (3)

[NORTH J. Why should the plaintiffs be charged only with what they submit to be charged with? They might not submit to be charged with anything.]

If the plaintiffs do not submit to be charged with a sufficient amount they will run the risk of the foreclosure being reopened. The object of this form is to obviate the necessity of a fresh certificate by means of the submission of the plaintiffs to be charged with an amount sufficient to cover all that can possibly come into the receiver's hands between the date of the certificate and the foreclosure absolute.

NORTH J. It would not be fair to the mortgagor that the mortgagee should receive interest on the mortgage debt, and also what may come into the receiver's hands during the six months allowed for redemption. The plaintiffs ought to be charged with what (if anything) shall have been paid into court by the receiver, and such sum as shall be in the receiver's hands at the date of the certificate, and you may add, "and also such a sum (if any) as the plaintiffs shall submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order for foreclosure absolute." (4)

Solicitor: *A. Allistone.*

(1) W. N. (1893) 91.
(2) W. N. (1894) 134.
(3) (1893) 38 Sol. J. 10.
(4) Vide *Blaiberg* v. *Gatti*, (1896) 100 L. T. Jour. 441.

W. L. C.

GRIFFITH *v.* TOWER PUBLISHING COMPANY, LIMITED, AND MONCRIEFF.

STIRLING J. 1896 Oct. 30.

[1896 G. 1617.]

Contract—Author and Publisher—Publishing Agreement—Assignability.

The principle established by *Stevens* v. *Benning*, (1854) 1 K. & J. 168, *Reade* v. *Bentley*, (1857) 3 K. & J. 271, and *Hole* v. *Bradbury*, (1879) 12 Ch. D. 886, that a publishing agreement between an author and a publisher, or a firm of publishers, is personal to the individuals entering into it, and that the benefit of such an agreement is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company.

MOTION.

The plaintiff, who was the author of certain novels, entered into agreements with the defendant company for their publication.

The first agreement related to a story called "The Angel of the Revolution," which had already appeared in a serial form in a publication called *Pearson's Weekly*. This agreement was contained in two letters. On July 3, 1893, the defendant company wrote to the plaintiff as follows:—

"Referring to our interview of Friday last, we have gone over the copy for your book, 'The Angel of the Revolution,' and are now prepared to undertake its publication upon equal sharing terms—i.e., we find the money, take all risks, and only charge actual out-of-pocket costs of printing and advertising, and hand you half of the ascertained profits. Should this be satisfactory to you, we shall be pleased to receive your acceptance of this offer at your convenience."

On July 11 the plaintiff replied as follows:—

"I have pleasure in accepting the terms which you offer in yours of the 3rd inst. with reference to the publication of my story 'The Angel of the Revolution.' Mr. Bathgate has communicated with me the result of his interview with you and I accept your offer on the understanding conveyed by him that he has discussed with you and agreed upon the following conditions of publication.

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"The copyright of the work is to remain with Mr. Pearson and myself with the proviso that you have the sole right of producing the work in volume form subject to our agreement. You are to publish a series of six shilling editions; the number of each edition to be agreed upon between us. . . . (1) The style and get-up to be equal to that of 'The Captain of the Mary Rose' with not less than sixteen full-page illustrations, equal in all respects to the first copies of this work.

"You are to publish a series of three-and-sixpenny editions when the sale of the six shilling edition is exhausted, and books and accounts connected with the publication are to be open for the inspection of myself or an agent bearing my written authority. . . ."

The plaintiff afterwards entered into similar agreements with the company in respect of two other novels written by him.

The company subsequently became insolvent; and in an action brought against them by a debenture-holder, the defendant Moncrieff was appointed receiver and manager of all the property and assets of the company comprised in or subject to a debenture issued by them, including the plaintiff's works.

The defendant Moncrieff having informed the plaintiff of his intention to sell the plaintiff's books, together with all the company's rights under the above agreements, to another publishing firm not approved of by the plaintiff, this action was brought; and the plaintiff now moved for an injunction to restrain the defendants from selling or assigning without the plaintiff's consent the benefits, rights, or interest alleged by the defendants to be now vested in them, or one of them, under the said agreements.

The plaintiff stated in his evidence that what induced him to enter into the agreements with the defendant company was, first, that he liked the style and form in which books published by the company were got up; and, secondly, that he was favourably impressed by the company's manager as a man of business.

(1) Some business details are omitted as not material for the purposes of this report.

Millar, Q.C., and *T. B. Napier*, for the plaintiff. Agreements of this kind between author and publisher, being of a personal nature, are not capable of assignment without the author's consent: *Hole* v. *Bradbury* (1); *Stevens* v. *Benning* (2); *Reade* v. *Bentley*. (3)

[STIRLING J. Can the personal confidence reposed by an author in a firm, or an individual, exist in the case of an incorporated company?]

Yes. The company may have a reputation to keep up, and may inspire confidence by its officers and servants.

Hastings, Q.C., and *Edward Ford*, for the defendant Moncrieff. The principle of the authorities cited does not apply to the case of a contract between an author and a limited company. The constitution of a company may alter, and its officers may be changed at any time. But, assuming that the agreement is not assignable, then nothing would pass by an assignment, and an injunction is unnecessary.

The company did not appear.

Millar, Q.C., in reply.

STIRLING J. (after stating the facts and referring to the first agreement). If the agreement in question had been entered into with an individual or a partnership firm, it is clear, upon the cases, that the contract would be of a personal nature, and that the benefit of it would not be assignable. There are three authorities bearing upon the point: *Stevens* v. *Benning* (2), *Reade* v. *Bentley* (3), and *Hole* v. *Bradbury*. (1) It is not necessary for me to go through them; but from what is there laid down it is clear that the benefit of agreements of this kind is not assignable. There is a sentence in the letter of July 11, 1893, to the effect that the copyright is to remain with the plaintiff and Mr. Pearson, subject to the right of the company to produce the novels in volume form under the agreements. That seems at first sight to give to the company something in the nature of copyright in the right of production in volume form; but I think the true meaning is, that it merely

(1) 12 Ch. D. 886.

(2) 1 K. & J. 168; (1855) 6 D. M. & G. 223.

(3) 3 K. & J. 271.

STIRLING J. constituted a licence to produce the work under the agreement. The Tower Publishing Company is now insolvent. It is unable to perform the agreement, and a receiver of the business has been appointed. It is suggested that there is a difference between a company contractor and an individual contractor, and that though a contract entered into between an author and an individual publisher or a publishing firm consisting of individuals may not be assignable, yet a similar contract entered into between an author and a limited company is capable of assignment. I should hesitate long before accepting that view. If the contract is assignable, then it is not merely assignable in case of a winding-up, but must be assignable at any moment. I think it would be startling to authors who have entered into publishing agreements with firms whose businesses have recently been converted into public companies to be told that their agreements were assignable by those companies. But in truth it seems to me it would be going too far to draw any such distinction. An author may have confidence in a limited company as well as in an individual publisher. A limited company may have a reputation for producing books in good style and attractive form, and an author selecting such a company as his publisher may do so in the reasonable expectation that the company, although its members and its officers may fluctuate, may nevertheless consider itself under an obligation to maintain its reputation. In the present case what attracted the plaintiff was that the company had published certain books in a form and style of which he approved. No doubt part of the inducement was also that the company had a very efficient manager. It was said that the company might have discharged him the next day without giving the plaintiff cause to complain. That observation is well founded. The company might have discharged its manager the next day, and appointed new officers at any time; but still the plaintiff might well act on the assumption that the Tower Company and those who directed its affairs would select a manager who would maintain the reputation of the company.

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It seems to me that it would be wrong to draw any such distinction as is suggested between an agreement entered into by

an author with an individual publisher and a similar agreement between an author and a limited company; and agreements of the former kind being non-assignable, I hold that agreements of the latter description are also incapable of being assigned.

I think, therefore, that an injunction ought to be granted. It is true that any assignment of the agreement might be inoperative; but still it might give rise to disputes between the plaintiff and persons who might seek to avail themselves of the position of assignees.

Solicitors for plaintiff: *Harrison & Davies.*
Solicitors for defendant: *McKenna & Co.*

G. A. S.

PATTLE *v.* HORNIBROOK.

[1895 P. 2213.]

Agreement for Lease—Signature not final—Parol Evidence.

The plaintiff, a spinster, having signed an agreement for the lease of a house to her by the defendant, the defendant subsequently signed it, and handed it to his solicitor with instructions not to part with it except on condition that the plaintiff obtained some responsible person to join in the lease—a condition which the plaintiff declined to fulfil:—

Held, that evidence was admissible to shew that no agreement was come to between the parties, and that the true effect of the transaction was that the defendant declined to enter into an agreement on the terms of the written document, but at the same time made a counter offer which was rejected, and that there was no agreement.

In this action the plaintiff, a spinster, claimed by the writ and statement of claim specific performance of an agreement in writing dated September 24, 1895, whereby the defendant agreed to grant her a lease of a leasehold house, No. 2, Bloomsbury Street, or damages for the breach of it. At the trial the claim for specific performance was given up, and damages only were sought.

The defendant by his defence denied that he had entered into any agreement with the plaintiff, and alleged that he had declined to accept her as tenant unless some responsible persons

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were associated with her as lessees (pars. 1 and 2). The defendant further alleged that on September 25 he handed the document set forth in the statement of claim signed by him to his solicitors as an escrow to be delivered to the plaintiff only on the condition imposed by him as aforesaid being complied with, and that as the said condition was never complied with, the document was never delivered to the plaintiff, and the defendant cancelled his signature (par. 5).

The facts were as follows:—

Previously to September, 1895, the defendant, being the owner of a leasehold interest in the house in question under a lease granted by the Duke of Bedford, placed the house, it being then unoccupied, in the hands of an auctioneer and estate agent named Hewer, who had authority only to procure a tenant, and not to bind the defendant by an agreement. The business relating to the letting of the house was transacted by Hewer's head clerk, one Brown, who had since disappeared and was not a witness at the trial. On Saturday, September 21, 1895, Brown wrote to the defendant informing him that he had just had a bonâ fide offer of 200*l.* per annum for the house, and asking to be informed what he was to say. The name of the person making the offer did not appear in the letter. On Monday, September 23, the defendant, who had been in the country, came to London, and went in the first instance to his solicitors, Messrs. Nisbet & Co., informed them of the offer, and said that he could arrange a meeting between them and the proposed tenant. He then went on to Hewer's office and saw Brown, and directed him to arrange the meeting with the solicitors. The defendant stated in his evidence that he did not know and did not inquire who the proposed tenant was, but believed from what had passed between Brown and himself on previous occasions that the tenant was to be a company named the Lighting Corporation. On September 24 the plaintiff, her brother-in-law Charles Pond, who was manager of the Lighting Corporation, and whose office was in the same house as Hewer's, and Brown called at Messrs. Nisbet's office. An agreement which had been prepared in the office and a draft lease were handed to them; they went out into the waiting-

room and examined the documents, and the plaintiff, being satisfied, signed the agreement. They then went into the room of Mr. Nisbet, the senior partner, and handed the signed document and the draft lease to him. There was a conflict as to what then happened. Mr. Nisbet stated that as he had many such interviews he could not say what happened on this particular occasion, but that there was one remark which he invariably made on these occasions, namely, to say, addressing the proposed tenant, "The house is now yours subject to the landlord being satisfied as to your responsibility," and he had no doubt that he said so on this occasion. The plaintiff and Mr. Pond denied that anything of the kind was said.

The signed document remained at the close of the interview in Mr. Nisbet's hands, and he stated that subsequently, on the same day, Brown asked leave to take it on to the defendant, and that such leave was given. Accordingly Brown brought it to the defendant, who gave the following account of what took place: "Brown told me that Mr. Nisbet said, 'You are to sign the document in a particular place,' which he pointed out. I said, 'I did not know the tenant was to be a lady.' I demurred, and said, 'I thought the tenant was to be the Lighting Corporation.' I signed the document, but not intending to let the property. Then Brown asked for the paper to take it back; but I said; 'No; I must see Mr. Nisbet about it myself and ask some questions'; and I put the document in my pocket." On cross-examination he admitted that he knew the tenant was to be a lady when he signed the document. On the next day the defendant went to Mr. Hewer's. Mr. Pond, the plaintiff's brother-in-law, was sent for and came, and he said that the defendant told him that he would not let the house to the plaintiff unless he could have additional security. At this time Pond had learned that the defendant had signed the agreement, and he said that he told the defendant that he had let the house, and that the plaintiff was quite responsible. Considerable discussion then took place between the defendant and Pond, as to which there was some discrepancy, but according to the defendant's account, which the Court accepted, he asked Pond whether two of the directors of the Lighting Corporation would

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not join in the lease; and Pond, who was the manager of the company, wrote down for him on a piece of paper (since lost) the names of two of the directors who Pond thought would join in the lease. Having got this paper, the defendant went on to his solicitors and saw Mr. Nisbet. He handed over the agreement and the piece of paper to Mr. Nisbet, and told him not to complete until he had the additional names joined as security. Thereupon Messrs. Nisbet wrote to the plaintiff's solicitor the following letter:—

"Dear Sir,

No. 2, Bloomsbury Street.

"Our client Mr. Hornibrook has been requested by Miss Pattle and Mr. Pond her brother-in-law to let the above house to Miss Pattle at 200*l.* a year and Miss Pattle has signed an agreement for a lease accordingly. Before however accepting her as a tenant Mr. Hornibrook desires to inquire who will be associated as lessees as we understand that Miss Pattle represents a company who wish to take the premises, and no doubt her responsibility is to be merged in that of the company. We shall be glad to hear from you on this subject as soon as possible or it might save time if you could favour us with a call to-morrow morning before 1 without appointment or at any later time up to 3½ by appointment to-morrow or any other day.

"We remain,

"Yours faithfully,

"Nisbet, Daw & Nisbet."

After some further correspondence the defendant broke off all negotiations, and granted a lease of the house to other persons; and the present action was then brought.

Germaine, for the plaintiff.

Hastings, *Q.C.*, and *Younger*, for the defendant. The defendant never entered into any agreement with the plaintiff. He never intended to part with the document which he signed except upon the fulfilment of a condition which was never complied with. There was never any delivery to the plaintiff.

and it is immaterial whether the document remained in the defendant's pocket or in the custody of his solicitor: *Pym* v. *Campbell* (1); *Gudgen* v. *Besset* (2); *Furness* v. *Meek*. (3)

Germaine, in reply. Although parol evidence is admissible to shew that there never were agreeing minds, it is not admissible to vary a written agreement. The condition which the defendant attempts to set up is a condition which alters and contradicts the document which he signed. Nothing was said by the defendant at the time when he signed the agreement as to other parties being added as lessees, or that he did not mean to sign it in the form in which it then stood. This condition was an afterthought. Here there was a perfect agreement at the time of signing, and an attempt to incorporate into it a subsequent oral agreement to defeat the written document cannot succeed: *Wallis* v. *Littell*. (4)

The mere fact of the defendant putting the agreement in his pocket is not sufficient to make it an escrow: *Doe*. d. *Garnons* v. *Knight*. (5)

[STIRLING J. Must not that case be taken as subject to *Bowker* v. *Burdekin* (6)?]

Gudgen v. *Besset* (2) shews that it must have been the intention of both parties to treat the document as an escrow.

The defendant cannot deny the contract, and then say that the contract was not to take effect because he chose to import a new condition at variance with the written document.

Cur. adv. vult.

Nov. 21. STIRLING J. having stated the facts substantially as above set out, continued as follows:—With reference to the various questions of fact which arise I think, in the first place, that Mr. Nisbet made the remark which he stated in his evidence that he usually did. This amounted in substance to an acceptance on behalf of the defendant of the offer by the plaintiff to take the house on the terms of the written agreement, subject only to the defendant being satisfied as to the plaintiff's

(1) (1856) 6 E. & B. 370.
(2) Ibid. 986.
(3) (1857) 27 L. J. (Ex.) 34.
(4) (1861) 11 C. B. (N.S.) 369, 375.
(5) (1826) 5 B. & C. 671, 692.
(6) (1843) 11 M. & W. 128.

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responsibility. If, however, no such remark was made, then it seems to me that the document signed by the plaintiff must be treated merely as an offer not accepted to any extent at the time when the plaintiff left Messrs. Nisbet's office.

Secondly, I think that as a matter of fact the defendant signed the document without intending finally to bind himself to accept the plaintiff as his tenant, or to abandon any right which he had to object to the plaintiff's responsibility. I come to this conclusion because the defendant appeared to me to be a truthful witness, and, further, because his conduct on September 25 appears to be consistent with and to confirm his account of what took place at the interview between Brown and himself on September 24.

Thirdly, I think that the effect of the defendant's instructions to his solicitor was this, that he was not satisfied as to the plaintiff's responsibility, and consequently declined to accept her alone as tenant, but was willing to accept her and two responsible persons as joint tenants on the terms in other respects of the written document.

Then arises the question whether the defendant after signing the document could in point of law take the course which he did. The general law is laid down thus by Erle J. in *Pym* v. *Campbell* (1): "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence. . . . The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." In the same case Crompton J. says: "I know of no rule of law to estop parties from shewing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done. . . The parties may not vary a written agreement; but they may shew that they never came to an agreement at all, and

(1) 6 E. & B. 370, 373.

that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to shew that does not vary an agreement, and is admissible." Both the learned judges, therefore, lay it down that evidence may be admitted to shew that there is not an agreement at all. Other authorities for the same proposition are *Gudgen* v. *Besset* (1) and *Furness* v. *Meek*. (2)

It is said, however, that though this may be so generally, the doctrine stated in these cases does not apply because the defendant has pleaded that he delivered the paper as an escrow on a condition; and that this condition is inconsistent with the written document, namely, that the plaintiff and two other persons not named should be joint lessees, and not the plaintiff alone. It may be that the form of pleading is open to some criticism, but in substance the defence of no contract appears to me to be proved. In the first place, the law as stated in *Pym* v. *Campbell* (3) is, that evidence may be given to shew that there was no agreement between the plaintiff and defendant; and the defendant has satisfied me that he never intended to accept the plaintiff as sole tenant. Secondly, I think the true effect of what the defendant and his solicitors did was to decline the plaintiff as sole tenant on the ground that the defendant was not satisfied of her responsibility, and at the same time to express willingness to accept her along with two other persons as joint tenants: or in other words, the defendant refused to enter into an agreement on the terms of the written document, but at the same time made a counter-offer which was declined.

In my judgment there was no contract between the plaintiff and defendant, and the action must be dismissed.

Solicitors: *Rogers Hartley & Bastard; Nisbet, Daw & Nisbet.*

(1) 6 E. & B. 986. (2) 27 L. J. (Ex.) 34.
(3) 6 E. & B. 370, 373.

H. B. H.

STIRLING J.
1896
Nov. 26.

In re LEVER.
CORDWELL *v.* LEVER.

[1895 L. 2364.]

Tenant for Life and Remainderman—Capital or Income—Leasehold House—Cost of Sanitary Works—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 121, 141.

The cost of sanitary works executed under the Public Health (London) Act, 1891, upon leasehold houses forming part of a residuary bequest to trustees upon trust for tenant for life and remaindermen:—

Held, payable out of the capital of the residuary estate.

THIS was an originating summons taken out by the surviving trustee of the will of George Lever to determine (inter alia) whether certain sums amounting in the aggregate to 122*l.* 6*s.* 9*d.*, expended in executing sanitary works upon three leasehold houses which formed part of the testator's residuary estate, were payable out of capital or income.

The testator, by his will dated March 18, 1880, devised and bequeathed his residuary estate to trustees upon trust to sell his real estate and such part of his residuary personal estate as should consist of leasehold lands and tenements, and to call in and convert into money the remainder of his personal estate. And he directed his trustees to stand possessed of the proceeds (after providing for an annuity), upon trust for his wife for life, and after her decease, in the events which happened, upon trust for the children of his brothers James and Thomas. And the will contained a power to postpone the sale of the testator's real and leasehold estates during the life of the wife with her consent, and a direction to pay the rents and profits to her in the meantime.

The testator died on May 8, 1884. His residuary estate included several leasehold houses in London, all of which remained unsold at the date of this summons.

In 1893 notices were sent by the medical officer of health, under the Public Health (London) Act, 1891, addressed "to the owner or occupier, Mr. Meakin," who was employed by the

trustee as agent to collect the rents of the testator's leasehold houses, requiring certain works to be done upon three of the houses in question. These works consisted of drainage repairs and alterations, such as disconnecting the sinks from the drains, and supplying new traps and pipes where the old ones had become defective. The works were duly executed at a total cost of 122*l.* 6*s.* 9*d.*

After the summons was issued a new trustee of the will was appointed, and he was added as a defendant.

The main question raised by the summons was as to the propriety of selling the leasehold; but this case is not reported as to that.

P. S. Stokes, for the summons.

Grosvenor Woods, Q.C., and *Metcalfe*, for the tenant for life. The obligation to execute the sanitary works was a liability which fell upon the trustee, and the cost ought, therefore, to be paid out of the capital of the residuary estate, and not by the tenant for life: *In re Courtier* (1); *Brereton* v. *Day*. (2)

Hastings, Q.C., and *Dunham*, for the persons entitled in remainder. This is a charge which by virtue of the Act of 1891 falls on the house itself, and, as between the tenant for life and the remaindermen, it ought to fall on the tenant for life—these repairs being such as are usually done by the man in occupation: *In re Tucker's Settled Estates*. (3)

David Cowan, for the new trustee.

Grosvenor Woods, Q.C., in reply.

STIRLING J., with reference to the question how the cost of the sanitary works executed on the testator's leasehold property should be borne, said:—

It appears that under the Public Health (London) Act, 1891, the medical officer of health gave notice to the owner or occupier, and particularly to Meakin, the agent employed by the trustee to collect the rents, calling on him to do certain works in respect of some of the houses. The works have been done,

(1) (1886) 34 Ch. D. 136. (2) [1895] 1 I. R. 518.
(3) [1895] 2 Ch. 468.

STIRLING J. 1896 *In re* LEVER. CORDWELL *v.* LEVER.

and the question is how the trustee is to be repaid the sums which have been expended in so doing. The legal position appears to be this—that the Act throws the obligation of executing the works upon the owner: if he does not perform the duty the sanitary authority may execute the works, and the costs and expenses of so doing may be recovered in the first instance from the occupier, who may recover such costs and expenses back from the owner by deducting them from the rent; so that ultimately the incidence of these costs and expenses falls on the owner. Now, the owner is defined by the Act as the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person. Who, then, is the person receiving the rack-rent of the premises in this case? The answer is, the trustee. Therefore, this is an obligation which is thrown on the trustee.

Of course, being trustee, he is entitled to be indemnified, and the question is whether that liability is to fall on the tenant for life or is to be paid out of corpus. I can find nothing either in the will or in the general law which throws the cost of indemnifying the trustee on the tenant for life. The case of *In re Tucker's Settled Estates* (1), which has been referred to, seems to me to be of a different description. That was a case in which it was sought to obtain payment of repairs out of capital moneys under the Settled Land Act, and it was held that ordinary repairs ought not to be so paid. Here the question is how the trustees are to be recouped in respect of payments made for what do not appear to be ordinary repairs. The result is that the costs and expenses of executing these works must be recouped to the trustee out of the corpus.

Solicitors: *George Cordwell; Gasquet & Metcalfe; F. G. Cordwell; R. K. Metcalfe.*

(1) [1895] 2 Ch. 468.

H. B. H.

MURRAY *v.* EPSOM LOCAL BOARD.

STIRLING J.

1896

Nov. 24; *Dec.* 10.

[1894 M. 2157.]

Local Board—Highway Authority—Right of Way—Removal of Obstruction—Interested Member—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 26, 46—*Practice—Pleading—Striking out—Irrelevancy.*

A local board discharging duties in relation to the protection of public rights of way under s. 26, sub-s. 1, of the Local Government Act, 1894, is in the same position as a private individual protecting his own property, and is not acting judicially. Consequently, where an action was brought against a local board to restrain the removal of posts erected on a public footpath by the owners of the adjoining property for the purpose of preventing the footpath from being used for vehicular traffic, and the statement of claim alleged that a member of the board had used his influence with the board for his own private interest, and that in consequence thereof the plaintiffs had failed to induce the board to take steps to prevent the user of the footpath for vehicular traffic :—

Held, that the real issue was whether or not the posts constituted an obstruction to the public right of way, and that the allegations in the statement of claim were irrelevant and ought to be struck out.

THIS was an application by the defendants, the local board of health for the district of Epsom, that paragraph 16 and a part of paragraph 17 of the statement of claim might be struck out as irrelevant. The action was brought by the plaintiffs, as owners of certain property in Epsom known as Woodcote End House, for a declaration that they were entitled to erect posts upon one-half of a public footpath known as Madan's Walk, which abutted on their property, for the purpose of preventing the said walk being used for carts or vehicles, provided that such posts did not hinder or prevent the said walk or footway being used as a public footway, and an injunction to restrain the defendants from removing such posts.

The facts alleged by the statement of claim were as follows:—

Madan's Walk was a public footpath which joined a highway known as Woodcote Road. It had until recently been used exclusively as a footpath.

The plaintiffs were the owners of the adjoining property on the west side of the path, and W. G. Langlands was the

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owner of the adjoining property on the east side. Langlands, being desirous of laying out his property as a building estate, had constructed across it a road which came into Madan's Walk, and had pulled down a fence on his side of the footpath and set it back. The result of this was that people began to use Madan's Walk for carts and carriages. An action was then brought by the plaintiffs against Langlands to prevent him from using Madan's Walk for such traffic, and an injunction was obtained. But although that action was effective against Langlands, it was not effective against the public, and, with a view of preventing the public from using the footpath for vehicular traffic, the plaintiffs erected on the footpath certain posts, which Langlands proceeded to pull down. The plaintiffs then commenced a second action against Langlands, and an order was made restraining him from interfering with any erection placed by the plaintiffs on their moiety of Madan's Walk. The plaintiffs thereupon made the defendants acquainted with what they had done with regard to setting up the posts and the removal of them by Langlands, and strongly urged the board to exercise the powers they had for the protection of the public by putting posts across Madan's Walk at the point where the plaintiffs had put up posts as aforesaid.

The statement of claim then proceeded as follows:—

"16. Mr. Langlands is a very active and influential member of the board. Throughout all the negotiations which took place between the plaintiffs and the board with regard to the prevention of the user of Madan's Walk by the public for vehicles, and in all the board has done in reference thereto, Mr. Langlands has taken an active part, and has used his best endeavours to prevent the board from doing any act which would hinder Madan's Walk from being used for vehicular traffic. In so doing Mr. Langlands has been acting with a view to his own private interest and advantage, and not with a view to the proper discharge by the board of their public duties."

"17. In consequence of the influence which Mr. Langlands had and used on the board as aforesaid, the plaintiffs did not succeed in inducing them to take any steps for the protection of the said footway."

The statement of claim then went on to say that the plaintiffs erected two posts on their half of the footway, that such posts were so placed that they would not have hindered or obstructed the proper use of Madam's Walk as a footway, and were not a source of danger to the public in using the footway, and that the board had caused the posts to be removed.

Buckley, *Q.C.*, and *Dare*, for the defendants. The allegations complained of are irrelevant to the question at issue in the action, and ought to be struck out.

Hastings, *Q.C.*, and *S. Dickinson*, for the plaintiffs. We submit that the local board have been acting under the influence of Langlands, who has been using the board as an instrument of his own to carry on his quarrel with the plaintiffs, and that the acts of the board done under his influence ought not to be allowed to stand.

Rule 64 of Sched. II. to the Public Health Act, 1875, and s. 46, sub-s. 1 (*e*), of the Local Government Act, 1894, shew the care with which the Legislature provides that the board shall not be under the influence of any particular member.

Public bodies are trustees of their powers for the public: *Aberdeen Ry. Co.* v. *Blaikie* (1); *Reg.* v. *Lord Leigh.* (2)

Buckley, *Q.C.*, in reply. The board have acted rightly, and the mere fact that one of the members has a personal interest in the matter is not of itself a sufficient reason for vitiating their acts.

Cur. adv. vult.

Dec. 10. STIRLING J., having read the allegations in the statement of claim, continued as follows:—

It is alleged that Mr. Langlands has influence with the board, and has used it with a view to his own private interest and advantage, and not with a view to the proper discharge by the board of their public duties, and that in consequence the plaintiffs have not succeeded in inducing the board to take steps for the protection of the footway. It is not alleged that the members of the board other than Mr. Langlands have been

(1) (1853) 1 Macq. 461. (2) (1896) 13 Times L. R. 41.

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guilty of any malpractice, or that his influence over them has been acquired by illegitimate means, or even that they have surrendered their judgment to him or acted as his tools. It is consistent with the plaintiffs' allegations that all the members of the board (other than Mr. Langlands) do in good faith believe that their acts are entirely in accordance with the due discharge by them of their public duties. It is contended, however, that the acts of the board are vitiated by reason of Mr. Langlands being present at the meetings when the plaintiffs' applications were discussed, being allowed to speak and use his influence with the board, and succeeding in inducing the board to take his view. It was admitted that no direct authority in support of that contention was to be found either in the statutes or the general law. Sched. II., r. 64, of the Public Health Act, 1875 (38 & 39 Vict. c. 55), provides that a member of a local board who "in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, or of any work done under the authority of this Act in or for the district . . . . shall cease to be such member, and his office as such shall thereupon become vacant." A similar provision is found in s. 46 of the Local Government Act, 1894. These provisions, however, do not extend to the simple case of a member having a personal interest in a matter which comes before the board; and even if they did, the effect of them would be, not to vitiate the acts of the board, but to deprive the member of his seat. It is said, however, that this is not the only effect, and it was argued that in the case provided for by the rule and enactment to which I have referred the validity of the contract would be affected. In support of this argument the case of *Aberdeen Ry. Co.* v. *Blaikie* (1) was cited. It was there held that a contract entered into between the company and a firm, of which one of the directors was a partner, could not be enforced against the company and was voidable at their option. If, however, the company or the directors, after a full disclosure of the interest of the contracting director, chose to affirm the contract, I apprehend that it would be binding. At all events, the case is

(1) 1 Macq. 461.

no authority for the proposition that the existence of such an interest, disclosed or undisclosed, vitiates the resolution of the board. There is, indeed, an extensive class of cases in which it has been held that the presence of a person having a pecuniary interest at a meeting of a public body vitiates its proceedings, namely, where that body is acting judicially. A recent case of that kind is to be found in *Reg.* v. *London County Council* (1), in which it was held that the county council were acting judicially in determining applications for music and dancing licences. In the present case the defendants in the matters complained of are acting in the capacity of surveyors of highways under s. 144 of the Public Health Act, 1875, and performing duties which are thrown upon them by s. 26, sub-s. 1, of the Local Government Act, 1894, and there is no authority for saying that the acts of the board in that capacity are judicial in any sense, and, indeed, the authorities point the other way. The position of highway authorities in reference to the removal of obstructions to highways was much considered in the case of *Reynolds* v. *Urban District Council of Presteign* (2); and it is thus stated by the present Lord Chief Justice: "The present defendants have succeeded to the position and powers of the urban authority under the Local Government Act, 1894, and by s. 26, sub-s. 1, of that Act, the duty is imposed upon them of protecting all public rights of way, and of preventing, as far as possible, the stopping or obstruction of any such right of way, whether within their district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district, and of preventing any unlawful encroachment on any roadside waste within their district. I do not at all mean to dissent from some of the observations which were made by counsel for the plaintiff, pointing out that it is desirable that the question whether a private individual has encroached should not be decided by the public body acting in a high-handed way, or taking the law into their own hands. Where the question is one of doubt or difficulty, I think a judicial decision should be obtained by the

(1) [1892] 1 Q. B. 190. (2) [1896] 1 Q. B. 604, 608.

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public authority. If they proceed to act, professing to prostrate the encroachment under the powers of the statute, without having obtained such a decision, they run a considerable risk. The burden lies upon them of justifying their action; and, if they fail to justify by reason of their being unable to shew that there was an obstruction or encroachment, they become liable to damages for trespass. I think, however, that if they are able to shew that there is an obstruction or encroachment, they have the same right as a private individual has to protect his own property." It seems to me, therefore, that the position of the local board in proceeding to remove the obstruction is there placed upon the same footing exactly as a private individual protecting his own private property. I cannot see that in so doing they either confer any legal right or take away any legal right. And, further, these observations appear to me to shew that the question at issue between the plaintiffs and the defendants must be whether the posts erected by the plaintiffs constituted an obstruction to the public right of way which existed over Madan's Walk or did not. If they did, then the Court will not interfere in their favour. If, on the other hand, they did not, it seems to me that the Court ought to interfere in their favour. Regarding this as the real issue, I think that the allegations to which I have referred in paragraphs 16 and 17 are irrelevant, and that they ought to be struck out.

Solicitors: *Letts Brothers, for George White, Epsom; Murray, Hutchins, Stirling & Murray.*

H. B. H.

WALTHAMSTOW URBAN DISTRICT COUNCIL *v.* HENWOOD.

KEKEWICH J.

1896.

Nov. 11, 12.

[1896 W. 1462.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 267—*Notice—Service by Post—Evidence.*

Under s. 267 of the Public Health Act, 1875, in order to prove service of a notice by letter through the post, it is necessary to shew that the letter was "prepaid," and an affidavit containing no statement to that effect is insufficient as evidence of service.

THE plaintiffs, the Walthamstow Urban District Council, brought this action by originating summons asking for a declaration that they were entitled to a charge under the 257th section of the Public Health Act, 1875, on land and premises at Woodford Green, of which the defendant was the owner, for the sum of 40*l.* 17*s.* 2*d.*, being the apportioned amount payable by the defendant in respect of drainage expenses incurred by the plaintiffs under the 41st section of the Act and the 19th section of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), and also interest at 5*l.* per centum per annum; for a sale to enforce the charge; and for the appointment of a receiver.

It was proved by the affidavit of the plaintiffs' clerk that an apportionment of the expenses had been duly made by the surveyor of the plaintiffs in accordance with the provisions of s. 19 of the Public Health Acts Amendment Act, 1890, and the amount of the apportioned expenses payable by the defendant settled at 40*l.* 17*s.* 2*d.*, and that notices of such apportionment were duly served on the defendant and others.

The defendant made an affidavit stating that, after he received the notices of apportionment, he wrote to the chairman of the plaintiff council a letter of July 5, 1895, disputing the amounts settled by the surveyor. He produced what he averred to be a true copy of this letter, being a document of a long and voluminous character.

KEKEWICH J.

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WALTHAMSTOW URBAN DISTRICT COUNCIL v. HENWOOD.

The clerk to the plaintiffs then made an affidavit stating that he could find no trace whatever of the defendant's letter of July 5, 1895, being sent to the plaintiffs or to their chairman or clerk. He also stated that the defendant had had considerable correspondence with the plaintiffs, and produced two letters of the defendant dated July 13 and 22, 1895.

In reply the defendant made an affidavit containing the following statement: "The said letter of July 5, 1895, was addressed to the chairman of the plaintiff council at the offices of the said council, the address being the same as all my other letters to the chairman and clerk, and was put into the post by myself." It was not stated that the letter was prepaid.

The summons was adjourned into court, and now came on for hearing.

Naldrett, for the plaintiffs.

Fleetwood Pritchard, for the defendant, took the preliminary objection that, as there was a dispute between the defendant and the plaintiffs as to the apportionment, the case was one which, under s. 19 of the Public Health Acts Amendment Act, 1890 (1), could only be dealt with by a court of summary jurisdiction. He submitted that the affidavit of the defendant in reply constituted sufficient evidence of the service of a notice of the dispute on the plaintiffs by post within the requirements of s. 267 of the Public Health Act, 1875. (2)

(1) By s. 19 of the Public Health Acts Amendment Act, 1890, it is enacted as follows: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction."

(2) By s. 267 of the Public Health Act, 1875, "Notices orders and any other documents required or authorized to be served under this Act may be served by delivering the same to or at the residence of the person to whom they are respectively addressed, or where addressed to the owner or occupier of premises by delivering the same or a true copy thereof to some person on the premises, or if there is no person on the premises who can be so served by fixing the same on some conspicuous part of the premises; they

Naldrett. The evidence as to the service of notice on the plaintiffs is insufficient. Sect. 267 of the Act of 1875 requires that the notice if served by post shall be by "prepaid letter." The defendant by his affidavit does not state that the letter was "prepaid," or that he did not receive it back again through the post. Prepayment of the letter is obviously essential in order to ensure its delivery in the ordinary course of post.

Further, it is open to question whether the provisions as to service by post apply at all to a case like the present where there is no difficulty in effecting service in the ordinary way.

Fleetwood Pritchard, in reply. Sect. 267 of the Act of 1875 expressly provides that in proving service "it shall be sufficient to prove that the notice order or other document was properly addressed and put into the post," and it is not required that the fact of prepayment should be proved. The evidence is therefore sufficient.

KEKEWICH J. This preliminary question which I am now called upon to decide is purely technical. The plaintiffs, the local authority, ask me to declare that they are entitled to a charge in respect of certain expenses which, under s. 19 of the Public Health Acts Amendment Act, 1890, they are entitled to recover from the owners of houses "in such shares and proportions as shall be settled by their surveyor, or (in case of dispute) by a court of summary jurisdiction." Under s. 257 of the Public Health Act, 1875, such expenses can be made a charge on the premises in respect of which they were incurred; and I am now asked to declare that these particular expenses are a charge on the defendant's houses. There has been an apportionment of the expenses by the plaintiffs' surveyor; but it is alleged on the part of the defendant that there has been a dispute, and that therefore, by the terms of the statute, the only court which can deal with the matter is a court of summary

may also be served by post by a prepaid letter, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the notice order or other document was properly addressed and put into the post."

KEKEWICH J. 1896 WALTHAMSTOW URBAN DISTRICT COUNCIL v. HENWOOD.

jurisdiction. If there has been a dispute, it is clear that that contention is correct, and therefore all I have to decide is whether there has been a dispute or not. It is alleged that the dispute was raised by a notice given to the local authority, and there is put forward by the defendant a very long and voluminous document, dated July 5, 1895, purporting to be a copy of the notice. Assuming that document to be a proper notice, I find it is provided by s. 267 of the Public Health Act, 1875, that a notice of dispute may be served by post by a prepaid letter, and that in proving such service it shall be sufficient to prove that the notice was properly addressed and put into the post. The defendant swears that he sent this letter. The receipt of it is denied; and then, in reply to that denial the defendant swears that the letter "was addressed to the chairman of the plaintiff council at the offices of the said council, the address being the same as all my other letters to the chairman and clerk, and was put into the post by myself." I take leave to doubt whether notice to the chairman is sufficient; but, however that may be, the defendant does not swear that he put into the post a prepaid letter. Upon the construction of s. 267 of the Public Health Act, it seems to me that unless the letter was a prepaid letter it was not a notice within the section. Therefore I do not think that the evidence of the service of the alleged notice is sufficient; and the result is that the preliminary objection fails, and I must hear the application on its merits.

[His Lordship then heard the case on the merits, and ultimately made an order declaring the plaintiffs entitled to a charge.]

Solicitors: *G. Houghton*; *H. H. Wells.*

C. C. M. D.

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Nov. 4, 6, 25. *Dec.* 3.

[00200 of 1896.]

Company—Winding-up—"Just and Equitable"—Substratum gone — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 5.

In order to ascertain whether it is "just and equitable" that a company should be wound up on the ground that its substratum has gone, the Court, generally speaking, must look only at the objects of the company as defined by its memorandum of association, and cannot, for the purpose of interpreting the memorandum, regard a contemporaneous prospectus, even when it contains fraudulent misrepresentations, or the conduct of the promoters of the company, although they have acted fraudulently. And a winding-up order ought not to be made merely because a part of the subject-matter mentioned in the memorandum has gone. But if it is once established that a part of the substratum has gone, the Court is then bound to consider all the other circumstances in order to ascertain whether it is "just and equitable" that the company should be wound up, and such facts as (*a*) that the company was conceived and born in, and has been used for fraud, and (*b*) that a compulsory winding-up order affords the best means of enabling shareholders deceived by the prospectus to recover their subscriptions from the promoters, are then cogent circumstances in favour of an order to wind up.

T. E. B. and his two sons were relatives, and had been in the employment of, persons who, and whose family, had for many years been successful piano manufacturers, the existing firm being J. B. & Sons. T. E. B. and his sons, having ceased to be so employed, formed a company called "T. E. B. & Sons, Limited," manifestly incorporated to purchase and carry on a business which carried with it the exclusive right to use the trade-name of T. E. B. & Sons. A large amount was subscribed by shareholders on the invitation of a prospectus issued to the public, and out of this amount a great sum was paid to the vendors as purchase-money. In proceedings by J. B. & Sons it was found that the company was formed to filch from them as much of their trade as possible, and an injunction was granted restraining the company from using the name of T. E. B. & Sons, Limited, or the name of B., in connection with the manufacture or sale or hire of pianos without adding an express statement that the company was distinct from and had no connection with the old firm of J. B. & Sons:—

Held, on the petition of a shareholder, that—notwithstanding only a part of the substratum had gone, inasmuch as the company still had a valuable business which could be carried on consistently with obedience to the injunction, and that the majority of the shareholders in general meeting had voted against winding-up—it was "just and equitable" that the company should be wound up.

John Brinsmead & Sons had for many years carried on business in the manufacture and sale of pianofortes, and

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Thomas Edward Brinsmead, Edward George Stanley Brinsmead, Sydney Walter Brinsmead, and Albert Joseph Willcox were in the employment of the firm until October, 1894, when they left it. These four persons shortly afterwards commenced a similar business in partnership under the style of "T. Brinsmead & Sons," but on November 21, 1895, in an action brought against them by John Brinsmead & Sons [1895 B. 329] Romer J. granted an injunction restraining them "from carrying on the business of pianoforte manufacturers or dealers under the name of 'T. Brinsmead & Sons,' or under any other name so closely resembling the plaintiffs' name as to be calculated to lead to the belief that the business carried on by the defendants is the plaintiffs' business, or under any name or style of which the word 'Brinsmead' forms a part without also adding thereto the words 'Thomas Edward' or other the full Christian name of the eldest member of the firm whose name may be Brinsmead, and without also including as part of the name or style the surname of every other member of the firm whose name may not be Brinsmead," and "from issuing or publishing any circular, advertisement, or other document containing any representation or any statement leading or calculated to lead to the belief that pianos manufactured or sold by the defendants or either of them are of the plaintiffs' manufacture," and "from selling or disposing of any pianos having marked or impressed thereon the name of 'T. Brinsmead & Sons,' or any pianos having marked or impressed thereon any other name or combination of names of which the word 'Brinsmead' forms a part, without clearly distinguishing such pianos from the pianos manufactured by the plaintiffs, and from otherwise selling and passing off or doing any act calculated to enable other persons to pass off pianos manufactured or sold by the defendants as pianos of the plaintiffs' manufacture."

Shortly afterwards Willcox left the partnership, and in March, 1896, a company called "Thomas Edward Brinsmead & Sons, Limited," was registered under the Companies Acts, 1862 to 1890, with a capital of 8000*l.* in 1*l.* shares, and with the object of acquiring the business of Thomas Edward Brinsmead & Sons, the consideration being payable in fully paid shares.

In April and May, 1896, a special resolution was passed and

confirmed for the voluntary winding-up of this company, and in this liquidation the assets were apparently resold to T. E. Brinsmead, E. G. S. Brinsmead, and S. W. Brinsmead.

On July 22, 1896, another company, also called Thomas Edward Brinsmead & Sons, Limited, was registered with a capital of 100,000*l.* in 5*l.* shares. The objects of this company (below called "the company") as stated in its memorandum of association were, so far as material to this report, as follows:—

"(A) To acquire and take over as a going concern and carry on the business of pianoforte manufacturers, now carried on by Thomas Edward Brinsmead, Edward George Stanley Brinsmead, and Sydney Walter Brinsmead, at Bartholomew Works, Bartholomew Road, Kentish Town, in the county of Middlesex, under the style or firm of 'Thomas Edward Brinsmead & Sons,' together with the whole of the real and personal property and assets of the proprietors of that business used in connection therewith or belonging thereto, and with a view thereto to adopt and carry into effect (either with or without modifications) the agreement dated July 2, 1896, and made between Joseph Henry Davies, of the one part, and Stephenson Wilson of the other part."

"(B) To carry on as a joint stock company limited the business referred to in the said agreement as the same has heretofore been carried on by the said Thomas Edward Brinsmead, Edward George Stanley Brinsmead, and Sydney Walter Brinsmead, and also the general business of manufacturers of and dealers in pianofortes and other musical instruments and cabinets, pianoforte frame, hammer, key, and string makers, dealers in ivory and English and foreign timber, wood and ivory turners, fret-cutters and wire-drawers, and such other business (1) and processes in connection with the above-mentioned business as are customarily or usually carried on in connection therewith, or are naturally incident to such business."

The other object clauses of the memorandum (C to X) were in the common form now usually to be found in memoranda of association.

The agreement of July 2, 1896, was made between Davies, as the vendor, and Wilson, as trustee for the company, and

(1) *Sic.*

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was for the sale to the company of the property described in the schedule thereto for 76,650*l.*, payable as to 10,000*l.* in deferred shares of the company, and as to 66,650*l.* in cash, and the business sold was to be taken over as from March 25, 1896. The schedule was as follows:—

"1. All that the business of pianoforte manufacturers at Bartholomew Works, Bartholomew Road, Kentish Town, in the county of London (1), together with the goodwill thereof, and the exclusive right to use the name of Thomas Edward Brinsmead & Sons, and all trade-marks and designs connected therewith, and the benefit of all contracts and engagements to which the said vendor or the said Thomas Edward Brinsmead & Sons are entitled in connection with the said business, and all plant, machinery, tools, office furniture, stock-in-trade, goods, and effects in and about the said premises, belonging to the vendor or used in connection with the said business, and also all the benefit of the existing tenancy of the said works.

"2. [A piece of ground and factory in Ferdinand Street, St. Pancras, more fully therein described] as the same will be held on the term of years at the rental of 250*l.* per annum on an underlease to be granted by Francis William Jordan and Henry William Allabone, and all the plant, machinery, tools, fixtures, fittings and effects in and about the said premises."

Two other agreements, dated respectively July 1, 1896, had been entered into. By one of these the three Brinsmeads (Thomas Edward and his sons) had agreed to sell their business to Davies for 6000*l.* (1000*l.* in cash and 5000*l.* in shares). The other agreement was between Jordan and Allabone and Davies, and related to the proposed underlease. The business premises in Bartholomew Road consisted of a small workshop held at a rent of 55*l.* per annum. The other premises were held and agreed to be taken at a rack-rent.

The company in July, 1896, issued a prospectus to the public inviting subscriptions for shares, and stating that the company had "been formed for the purpose of acquiring, carrying on, and considerably extending the business of pianoforte manufacturers now carried on by Thomas Edward Brinsmead &

(1) *Sic.*

Sons" at the premises described in the schedule to the agreement of July 2, 1896. In response to the prospectus a number of persons subscribed for shares, and paid altogether a considerable sum of cash to the company.

On July 28, 1896, John Brinsmead & Sons commenced an action [1896 B. 3243] against the company, in which, on August 11, 1896, North J., on motion, made an order restraining the company "from using the name of 'Thomas Edward Brinsmead & Sons, Limited,' or the word 'Brinsmead,' in connection with the manufacture, sale, or hire of pianos, without adding thereto an express statement that the company are distinct from and have no connection with the old firm of John Brinsmead & Sons"; and after the petition mentioned below had been in the paper for hearing this order was affirmed by the Court of Appeal.

It was alleged that all the purchase consideration had been paid over to the vendor.

Before the petition was filed a number of shareholders had threatened, and some of them had actually commenced, proceedings for rescission of their contracts to take shares and return of the money paid by them, and rectification of the register of shareholders accordingly, on the ground that they had been induced to take shares by fraudulent misrepresentations in the prospectus.

J. W. Richardson, who had applied for and had allotted to him twenty-five ordinary shares in the company, for which he had paid 125*l.*, filed a petition on August 26, 1896, asking that the company might be wound up by order of the Court on the ground that its substratum was gone, and that it was "just and equitable" that it should be so wound up.

When the petition was part-heard, Vaughan Williams J. ordered it to be adjourned, and directed that during the adjournment a meeting of the shareholders should be summoned for the purpose of ascertaining the wishes of the shareholders as to whether the company should continue to carry on business or whether it should be wound up by the Court on the petition, and directed that one of the official receivers should be chairman of the meeting.

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At the meeting a majority of the shareholders present voted in favour of the business being carried on.

There was evidence that the company had manufactured a considerable number of pianos.

Warmington, Q.C., and *C. Lyttelton Chubb*, for the petitioner. The company was formed to carry on a business which could only be carried on in fraud of other people's rights. It has been judicially declared that that was its main object, and an injunction has been granted which prevents that object from being attained; therefore the substratum of the company is gone, and it is "just and equitable" within the meaning of s. 79, sub-s. 5, of the Companies Act, 1862, that the company should be wound up by the Court, even although a majority of the shareholders wish the company's existence to be continued: *In re Haven Gold Mining Co.* (1); *In re German Date Coffee Co.* (2) An order will always be made against a bubble company like this: *In re London and County Coal Co.* (3)

Many thousands of pounds have been paid to Davies, and a compulsory winding-up affords the only, or at any rate the best, means by which the shareholders can recover the money which they have been fraudulently induced to part with: *In re General Phosphate Corporation.* (4)

[VAUGHAN WILLIAMS J. That was only a dictum, and, although I do not think it is wrong, s. 8 of the Companies (Winding-up) Act, 1890, has since been so construed that a public examination is now almost unattainable.]

The official receiver would have no difficulty in reporting that there was fraud in the promotion of this company.

Swinfen Eady, Q.C., and *E. E. Fletcher, P. S. Stokes* and *Ashton Cross*, for shareholders supporting the petition.

Eve, Q.C., and *Mark L. Romer*, for the company. No ground is shewn for winding up the company. One of its objects was to carry on the business of T. E. Brinsmead & Sons, and that business can be successfully carried on without the injunction being disobeyed. But that is not the only substantial object of

(1) (1882) 20 Ch. D. 151.
(2) Ibid. 169.
(3) (1866) L. R. 3 Eq. 355.
(4) W. N. (1893) 142.

the company; another one is the manufacture and sale of pianos. As a matter of fact, although the company is a young one, a fair number of pianos have been manufactured by it, and that shews that the injunction has not paralysed the business.

Regard must be had to the wishes of the shareholders, who, after all, are the best judges of what is for their own interests.

Fraud in the promotion of a company is not a ground for winding it up, for the shareholders may waive the fraud: *In re Haven Gold Mining Co.* (1) And they have waived the fraud, if any, in the present case.

Alexander, Q.C., and *Rowden*, for shareholders opposing the petition. The petition is not a bonâ fide petition of a shareholder, but is really another attempt of John Brinsmead & Sons to strangle a rival company.

[They referred to *In re Suburban Hotel Co.* (2)]

W. Higgins, and *Wildey Wright*, for other opposing shareholders.

Warmington, Q.C., in reply, referred to *In re Anglo-Greek Steam Co.* (3)

Dec. 3. VAUGHAN WILLIAMS J. This is a shareholder's petition. The petition to wind up is based upon the 5th subsection of s. 79 of the Companies Act, 1862. The main ground upon which it is said that it is "just and equitable" that the company should be wound up by the Court is that the substratum of the business which the company was incorporated to carry on has become impossible. But the petition contains, in addition, allegations going to shew that the circumstances of the formation of the company require investigation, partly because, it is suggested, the company, whatever the scope of the memorandum of association, was in fact formed, so far as the intention of the promoters is concerned, for the purpose of fraudulently depriving the owners of the old-established business of John Brinsmead & Sons of as much of their business as could be got away through the belief of customers that they were dealing, not with Thomas Edward

(1) 20 Ch. D. 151. (2) (1867) L. R. 2 Ch. 737.
(3) (1866) L. R. 2 Eq. 1.

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Brinsmead & Co., Limited, but with the old firm of John Brinsmead & Sons, and partly because, it is alleged, the goodwill of the business purchased by the company, being of little or no value, was purchased by the company at a very large price—I think about 76,000*l.*—the shareholders being led to believe that they were purchasing the old-established business of John Brinsmead & Co., and that the price so paid, as to a very large extent—I think 40,000*l.*—passed into the hands of vendors, who are men without means. And it is sought to say that, even though the substratum of the business of the company, as defined by the memorandum of association, has not become strictly impossible, yet that the fact that there are these matters requiring investigation may itself make it just and equitable that the company should be ordered to be wound up compulsorily; and the more so because the Court of Appeal, affirming the judgment of North J., has restrained the company—i.e., Thomas Edward Brinsmead & Sons, Limited—from using the name of Thomas Edward Brinsmead & Sons, Limited, or the name of Brinsmead, in connection with the manufacture or sale or hire of pianos, without adding thereto an express statement that the respondent company are distinct from and have no connection with the old firm of John Brinsmead & Sons.

Now, the history of the formation of this company is given very succinctly in the judgment of A. L. Smith L.J., who says:—

"One has in this case to take a survey of one year and nine months, because nothing has to be counted except from October 24, 1894, to the date of July 28, 1896. What do we find? We find that for years and years, from the year 1834, I think—that is for years and years prior to October, 1894—John Brinsmead & Sons, or rather the Brinsmead family, now represented by John Brinsmead & Sons, have been carrying on and building up a trade in the manufacture and sale of pianofortes, which has become I may say universally notorious—I am speaking only from my own knowledge. Brinsmead pianos are as well known, I suppose, to any one who knows anything, as any other article in trade which is well known to anybody.

Prior to October, 1894, they had in their employment (that is the proper word to use for it, no matter what has been stated in the affidavits), a cousin, whose name was Thomas Edward Brinsmead, and who worked for them at the wage of 2*l.* 16*s.* 6*d.* per week. I emphasize that because many statements in the affidavits on the Thomas Edward Brinsmead side speak to the great capacity he has for making pianos. At any rate, he was a workman for his uncle at 2*l.* 16*s.* 6*d.* per week. Thomas Edward had a son named George, who was working for the uncle at 1*l.* 12*s.* 6*d.* per week, and Sydney was working at 1*l.* 10*s.* 4*d.* per week. That delineates accurately the position of the three Brinsmeads when they parted company with the uncle in October, 1894. I know there is a conflict in the affidavits as to why they parted company with the uncle. It is sufficient to say that they no longer continued to work for him. What do we then find? We at once find Mr. Thomas Edward Brinsmead with his two boys, in conjunction with a man called Willcox, who was also a workman who had left the old firm, setting up business in the manufacture of pianofortes under the name of T. Brinsmead & Sons. Now, I ask myself whether that was honest business to start with. Why did they take the name of T. Brinsmead & Sons? It was not true. As to the elder Brinsmead, his name was Thomas Edward Brinsmead. The 'Sons' is true, but the firm which started making the pianos in a small pettifogging way at that time was not T. Brinsmead & Sons, but Thomas Edward Brinsmead, his two sons, and a man named Willcox. But for some reason or other—and, for myself, I have no difficulty in surmising the purpose—this Brinsmead starts in rivalry with his uncle, or the old firm, under the name of T. Brinsmead & Sons. Well, I say he started in fraud. He took that name, I have not the slightest doubt in the world, for the purpose of filching from his uncle as much of the old trade as he could get by using that name, the name T. Brinsmead & Sons being as near to the old name, J. Brinsmead & Sons, as he could well go. I am not now going to pursue it, but the result of that was litigation by the uncle to restrain him. The uncle was successful. He got, first of all, an injunction from my brother Romer,

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which has been read by my brother Lindley. That injunction, at any rate in part, was evaded. There was a motion to commit. There were proceedings upon that, and we have heard what was the result of those proceedings. Then, after those proceedings had been taken, Mr. Thomas Edward Brinsmead turns himself into a limited company with his sons, and that goes on for a little while. Then the company is voluntarily wound up, and at last (mind, I am only taking one year and nine months) Mr. Thomas Edward Brinsmead and the two sons (Willcox appears to have dropped out) blossom out into a company issued to the public by the prospectus and the picture which we have seen enclosed in the prospectus, and no less a sum than 76,000*l.* is sought to be obtained from the public. For what? Using the name of Thomas Edward Brinsmead & Sons, Limited. These are the facts occurring in this one year and nine months. What is the 76,000*l.* got from the public for? What is to induce the public to subscribe 76,000*l.*? To use the new firm's name? Were they to pay 76,000*l.* for the business of the father and the two sons and Mr. Willcox, whose business was being dealt with, or were they to pay 76,000*l.* for the slice they could get out of the old business of John Brinsmead & Sons? Well, the question has only to be put to be answered in one way. Now, then, John Brinsmead & Sons bring this action against the company, limited, this new company, the 76,000*l.* company, Thomas Edward Brinsmead & Sons, Limited, to restrain them from using the name on the ground that the name Thomas Edward Brinsmead & Sons, Limited, is likely to deceive the public (I am not talking of shareholders; I have nothing to do with them; that will come out hereafter, I dare say) and is likely to induce the public to buy the new firm's pianos, thinking they are buying the pianos of the old firm of John Brinsmead & Sons."

The Lord Justice then goes on, dealing with the question whether the use of the name Thomas Edward Brinsmead & Sons, Limited, is likely to deceive the public into thinking that they are really buying the old firm's pianos, and points out that, although there is no evidence of any customer being deceived,

there is yet evidence that when the company was advertised as Thomas Edward Brinsmead & Sons, Limited, people embarked their money in a company which they saw advertised in the name of Thomas Edward Brinsmead & Sons, Limited, believing it was the old well-known company which had been known for years and years as John Brinsmead & Sons; and the Lord Justice says that there is cogent evidence that Thomas Edward Brinsmead, Thomas Edward Brinsmead & Sons, and Thomas Edward Brinsmead & Sons, Limited, have all been using this name with the intention of thereby getting as much of the old firm's trade into their own hands as they possibly could. The Lord Justice concludes by reading the injunction of North J., which I have set out, and saying that the order for the injunction was perfectly right. The only fact which I have to add is that it appeared upon the affidavits before me that the company was doing a considerable business, and, as I understand, has done that business since the granting of the injunction of North J., and, I suppose, consistently with it—at least there is no evidence before me to the contrary—and I thought it better when the petition was before me to order a meeting of the shareholders to ascertain what their views were. The view of the majority of the shareholders present at the meeting was that they would wish the business continued, and that the company should not be compulsorily wound up; but it is to be observed that a good many shareholders have brought actions to recover the sums paid by them for shares, on the ground that they were induced to take them by fraud, and more shareholders might be disposed to bring actions if no winding-up order is made; and shareholders thus placed might well hesitate to attend the meeting of shareholders and vote, lest they should prejudice their right of recovery. Moreover, those shareholders who could not bring actions by reason of the winding-up order having been made might well desire a winding-up order on the ground that proceedings immediately taken by the liquidator might lead to the recovery of some of the purchase-money paid to the vendors.

Having regard to the history of this company, one's inclination

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is to make a winding-up order if one has discretion in the matter; but there is no jurisdiction to make a winding-up order unless one of the grounds of winding-up mentioned in s. 79, as interpreted by the decisions on it, is established; and one must be careful not to prejudice the interests of the shareholders who may have been defrauded, by taking away from them the business into which they have been fraudulently induced to embark, if they can legitimately carry on that business, and think that their losses will be mitigated thereby. Let me deal first with the question whether the substratum of the company is gone. Generally speaking, one must look at the memorandum of association to ascertain whether the business as defined by it has become impossible. It is to the memorandum only that one must look to ascertain the objects and purposes of the formation of the company; and in my judgment one cannot look at the prospectus or the conduct of the promoters for the purpose of interpreting the memorandum of association. Now, looking at the memorandum of association in the present case, apart from the name of the company there is nothing to justify me in saying that the business as defined by the memorandum has become impossible. It is said, and appears to be the case, that shareholders have taken shares in the belief that the business of the company was to be the taking over of the business of John Brinsmead & Sons, and there is nothing in the memorandum of association (I say nothing of the prospectus) to justify this belief. Misrepresentations in the prospectus may justify the shareholders in bringing actions to recover their subscriptions; but the mere fact of there having been fraud in the promotion of the company or fraudulent misrepresentation in the prospectus will not be sufficient of itself to found a winding-up order, for the majority of the shareholders may waive the fraud and confirm the transaction: see *In re Haven Gold Mining Co.* (1) There is evidence that they have done so in this case. I was further urged by counsel to wind up this company as a bubble company, and the fraud of the promoters and conduct of the directors were relied upon as evidence that the company was of that character. A company

(1) 20 Ch. D. 151.

may be wound up under the "just and equitable" clause if it is a bubble company. There is no very accurate definition of what constitutes a bubble company. In *In re London and County Coal Co.* (1) the ground for winding up the company seems to have been that there was no bonâ fide intention on the part of the directors to carry on business in a proper manner; but I do not think that the present case is covered by that decision. Again, in *In re West Surrey Tanning Co.* (2) the winding-up order seems to have been based upon the allegation that the company had been brought out for the purpose of improving the property bought by the company in order that the same might revert in its improved condition to the actual vendor, who held five times as many shares in the company as all the other shareholders together, coupled with the fact that there were matters which required investigation; and the company in question, it should be observed, had already passed, but not confirmed, a special resolution for voluntary winding-up. Here, again, the ground upon which the Court went seems to have been that there was no bonâ fide intention to carry on the business defined by the memorandum of association; and it is inapplicable to the present case. In *In re Anglo-Greek Steam Co.* (3) the head-note is: "The misconduct of the directors and manager of a limited company, though it may be such as to render them liable if a suit were instituted against them by the shareholders, is not a ground on which the Court will consider it 'just and equitable' to wind up the company under s. 79 of the Companies Act, 1862, where there is no evidence that their mismanagement has produced insolvency, or that the company is a mere bubble company, and where there is a reasonable prospect that, under proper management, it may be successfully carried on." I do not think that I can make the order here upon the ground that this company was a bubble company. In *In re Diamond Fuel Co.* (4) it was held a ground for a compulsory order that the company could not carry on business, and that assets might be recovered from the fraudulent promoters; but the real ground of the decision was that the

(1) L. R. 3 Eq. 355.
(2) (1866) L. R. 2 Eq. 737.
(3) L. R. 2 Eq. 1.
(4) (1879) 13 Ch. D. 400.

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company practically had ceased to carry on business, and that the carrying on of the business had become in a practical sense impossible. The fact that money was likely to be recovered from the promoters is really referred to as justifying making the order on the petition of a fully paid-up shareholder. I mention this because great stress was laid in argument on this point.

It remains for me to consider whether there are any other circumstances or combinations of circumstances which will justify my making an order in this case, either because the substratum is gone or for any other reason, ejusdem generis with the ground stated in the first four clauses of s. 79, because such circumstances make it just and equitable. The possible grounds seem to me to be—first, that it has been impossible for the company to use its corporate name, and that therefore the substratum of the business which the company was formed to carry on has gone. This contention is based upon the fact that the injunction has been granted which restrains the company from using the name of "Thomas Edward Brinsmead and Sons, Limited"—not generally, observe, but "in connection with the manufacture, sale, or hire of pianos, without adding thereto an express statement that the defendant company are distinct from and have no connection with the old firm of John Brinsmead & Sons." It it said that this renders the carrying on of the business defined by the memorandum of association impossible. Now, it seems to me that a compulsory order cannot be made on this ground unless it can be said that the effect of the injunction is to prevent either the use of the corporate name altogether or the use of the corporate name as a trade-name as defined in the memorandum of association and the agreement of sale. If I am right, the only thing which can be said in support of the petitioner's contention is that he and the other shareholders took shares in a company whose memorandum of association states that it is established to acquire and take over the business carried on by Thomas Edward Brinsmead, Edward George Stanley Brinsmead, and Sydney Walter Brinsmead under the style of Thomas Edward Brinsmead & Sons, with a view to adopt and carry into effect

the agreement of July 2, made between Davies and Wilson, which agreement includes the purchase of the said business, together with the goodwill thereof and the exclusive right to use the name of Thomas Edward Brinsmead & Sons, and that the result of the injunction is that the company can only in a limited sense avail themselves of the goodwill and right to use the name of Thomas Edward Brinsmead & Sons—in short, that the sale included in effect a trade-name which the vendors had no right to sell. It may be said against this contention that it only means that the petitioner contemplated that the company would have the benefit of using a name so similar to the name of John Brinsmead & Sons that the company would get the benefit of John Brinsmead & Sons' connection, and wishes to have the company wound up because he finds that cannot be done. I should observe that it is almost impossible that any one who read the prospectus, which was printed on the same paper as the memorandum of association, should pretend ignorance of the existence of John Brinsmead & Sons; and if he says that he thought that Thomas Edward Brinsmead & Sons and John Brinsmead & Sons were identical, all I can say is that if he read both memorandum and prospectus he had no right to think so. But it may be said, on the other hand, that the memorandum of association, coupled with the price mentioned in the agreement incorporated in the memorandum—namely, 76,650*l.*—imports that the trade-name and goodwill purchased are a trade-name and goodwill not only of great commercial value, but which the purchasing company will have the right to use without infringing the rights of any one else. When dealing with these contentions I think that it is worthy of observation that it is not improbable that the vendors did think that they had a right to sell the unrestricted exclusive use of the name of Thomas Edward Brinsmead & Sons. It is not an unnatural view to take of the effect of the injunction of Romer J., although we now know that it was a wrong view. Before finally disposing of this point I wish first to mention another ground upon which it is contended that it is just and equitable that I should make a winding-up

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order, because the ground in question is based upon facts which may be material when one is considering whether it is just and equitable that a winding-up order should be made, for in my judgment such an order ought not to be made merely because a part of the subject-matter mentioned in the memorandum of association has gone.

One ought to consider the whole of the circumstances, and say whether it is just and equitable that this partnership should be dissolved. The other ground is that it has been proved that the company was formed, in fact, for the purpose of defrauding John Brinsmead & Sons, and that all that was done prior to the injunction of North J. was done with the intention to defraud; and then it is suggested that a minority of innocent shareholders may very well say that this is a case in which it has been proved that part of the substratum is gone, and that, although this alone might not be sufficient to justify an order, yet it is sufficient when the fraud above mentioned is taken into consideration, for they may say, "We believed that we were embarking our money in an honest business, and are not bound to continue partners in a business which was erected in fraud and has been used for the purposes of fraud ever since the incorporation of the company." There seems to me to be great force in this; but I think I ought to take into consideration on the other side that it is obvious that the present petition is presented in the interest of John Brinsmead & Sons, and when it comes to a matter of discretion I have a great aversion to a petition presented for an indirect purpose. I do not think that John Brinsmead & Sons could obtain an injunction restraining the company from carrying on business, provided it was carried on in accordance with the provisions of the injunction of North J.; and I have little doubt that these proceedings, in which both the petitioner and some of those who appear in support of the petition are represented by the solicitors of John Brinsmead & Sons, are really taken for the purpose of obtaining indirectly what could not be obtained directly.

I have omitted to mention, but it was urged upon me, that

one reason why I ought to make this order was the large amount of cash which has been paid to the vendors, and that, in case shareholders make out a right to repudiate on the ground that they were induced to take shares by fraud in the prospectus, a winding-up order affords the best means of making the vendors disgorge the proceeds of the fraud, and that a sufficient primâ facie case of fraud has been made out to make it right that this increased facility of procedure should be taken into consideration. Standing alone, I do not think that this primâ facie case and the advantages of a winding-up order in case the fraud is proved would afford a ground for making an order on the petition, but I think that this is one of the circumstances which I ought to take into consideration.

I have now been through all the facts of the case, and the outcome is this—that I do think that a part of the substratum of the business which this company was incorporated to carry on has gone. I think that the company was manifestly incorporated to carry on a business which should have the advantage of the user of the trade-name of Thomas Edward Brinsmead & Sons and the goodwill attaching thereto. I think that that is plain, because the memorandum in so many words refers to the agreement under which the company purchased the goodwill and the exclusive right to use this name of Thomas Edward Brinsmead & Sons. I think, therefore, that a part of the substratum is gone. I have already said that I do not think I ought to make an order because a part of the substratum of the business, as defined by the memorandum of association, has gone; but I am afraid that I am bound to come to the conclusion that it is a very material part. The price given (76,650*l.*) can only be accounted for on the basis that the user of this name and the goodwill attaching to this business were considered by the vendors and purchasers to be of great value. Under those circumstances I am perfectly clear that there is a state of things which would justify me in making a winding-up order if I thought it right in my discretion so to do—for I have a discretion. I have been through the facts at considerable length, because I think that in the exercise of my discretion I ought to be guided by those facts, and the balance, in my

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opinion, shews that I ought to make a winding-up order in this case: therefore I make it.

I was very anxious, if I could, to save the interests of the innocent shareholders who wished to carry on the business, because I have no doubt myself that there is a valuable business which can be carried on, and carried on consistently with the injunction of North J. More than that, I have no doubt whatever that, quite apart from any connection with John Brinsmead & Sons, Thomas Edward Brinsmead, from his past history and connection with pianofortes, has something which is extremely valuable to sell and something which he has a perfect right to sell. It cannot be said that because Mr. T. E. Brinsmead has been in his uncle's business for over thirty years, and has, as he says, acquired a great name and reputation for his personal capacity in the manufacture of pianofortes, he is not entitled to carry on the same kind of business in his own name so long as he does not carry it on in such a way as to infringe the rights of his uncle in the name of John Brinsmead & Sons. That being so, I have been very unwilling to make this order, and I considered whether there was no way in which I might avoid doing so. As I have said, the mere fact that a part of the substratum is gone is not sufficient. I had to look at all the circumstances and see whether I ought to make the order, and it occurred to me that I might possibly preserve the interests of the innocent shareholders and do justice to all the parties if I could make the order in a sense conditional—if I could have said that I would abstain from making the order if the vendors would place in some safe custody the purchase-money which they have received, because, where the circumstances on the one side and the other so nearly balance as they do in this case, I feel that the argument to which I have alluded about the loss and recovery of the purchase-money was a considerable weight in the scale in favour of making the order, and I thought I could get rid of that weight if I made my order thus conditional. But when I came to consider the matter no machinery occurred to me by which I could do this; therefore, reluctantly, I make the order—reluctantly, I say, because I think the majority

of the shareholders have a good business capable of being carried on.

Solicitor for petitioner and for some shareholders supporting the petition: *W. Maskell.*

Solicitors for other supporting shareholders: *Pownall & Co.; J. H. Moggridge.*

Solicitors for the company: *Thomson & Co.*

Solicitors for shareholders opposing the petition: *Holden & Co.; Beall & Co.; Taunton & Dade.*

F. E..

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KEKEWICH J.
Oct. 30.
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Nov. 18.

FOXWELL *v.* VAN GRUTTEN.

[1896 F. 1347.]

Practice — Ejectment Action — Disputed Title — Defendant in Possession — Receiver — Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

In a pending action to recover possession of land, the Court has jurisdiction, under s. 25, sub-s. 8, of the Judicature Act, 1873, to appoint a receiver, although the title is legal and the defendant is in possession.

Held, by the Court of Appeal, that a case must be made to justify such appointment, and an order for a receiver made by Kekewich J. was discharged as made on insufficient grounds.

THIS was a motion on behalf of the plaintiffs, William Foxwell and others, who were persons in a humble position, that a receiver might be appointed of the rents and profits of two properties in Cornwall, known as the Croft West and Lanner estates, until the hearing of the action. By the writ in the action, which was issued on September 3, 1896, the plaintiffs claimed to recover possession of those properties, and this action was now pending. The defendant, Lucien S. L. Van Grutten, was now in possession of the properties, and claimed to be entitled to such possession as heir-at-law of William Henry Harris Hartley, who died on June 27, 1894, seised of these estates. In February, 1895, the plaintiffs had commenced an action against the defendant to recover possession of certain other properties of which Hartley had died seised, known as the Rosteague and Rosewarne estates, which were in the same county as, and at a distance of a few miles from, the Croft West and Lanner estates, but were not held under the same title, though the Rosewarne and the Croft West and Lanner estates had many years ago belonged to the same owner. At the trial of that action judgment was given for the plaintiffs for the recovery of possession of both the Rosteague and Rosewarne estates. An appeal from that judgment by the defendant to the Court of Appeal was allowed as to the Rosteague estate, but dismissed as to the Rosewarne estate. Cross-appeals were now pending in the House of Lords. The

plaintiffs had since served notices on the tenants on the Rosewarne estate, which, as they alleged, included the Croft West and Lanner estates, requesting payment of the rents to them. The defendant thereupon commenced an action against the plaintiffs to restrain them from serving notices on or interfering with the tenants of the Croft West and Lanner estates, and in that action a motion for an interim injunction for that purpose by the defendant came on for hearing with the plaintiffs' present motion for a receiver.

It appeared from the evidence on the motion for a receiver that the defendant had executed a legal mortgage upon the Rosteague estate and also the Croft West and Lanner properties, and had also executed a bill of sale of the furniture and effects in his London residence, and had not paid to the plaintiffs the whole of the sum which he had been ordered to pay in the previous action in respect of mesne profits.

W. H. H. Hartley had been found a lunatic, and remained of unsound mind up to his death. The defendant had been proved to be his heir-at-law in the lunacy proceedings, and upon his death had entered into possession of all the lands of which he died seised.

The motion was heard before Kekewich J. on October 30, 1896.

Renshaw, Q.C., and *Mark Romer*, for the plaintiffs. The plaintiffs are entitled to the appointment of a receiver for the protection of the Croft West and Lanner estates. The evidence shews that the defendant is in impecunious circumstances; and if he is permitted to continue to receive the rents of these properties, and the plaintiffs succeed in the present ejectment action, there will be a difficulty in afterwards getting back those rents from him.

Warrington, Q.C., and *J. H. Boome*, for the defendant. The Court has no jurisdiction to appoint a receiver in an ejectment action before judgment: *Earl Talbot* v. *Hope Scott.* (1)

[*Renshaw, Q.C.* That case has, since the Judicature Act, 1873, been held to be no longer law: *Berry* v. *Keen.* (2)]

(1) (1858) 4 K. & J. 96, 139; 27 L. J. (Ch.) 273.
(2) (1882) 51 L. J. (Ch.) 912.

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Even if the Court has jurisdiction, it has a discretion, and it will not appoint a receiver where there is a person in possession to receive the rents. The case might be different if fraud were alleged, and if there were no one to receive the rents. There are here no special circumstances to justify the Court in interfering with the legal possession. No doubt the defendant in possession is a poor man, but the plaintiffs are impecunious also.

KEKEWICH J. In my opinion, sub-s. 8 of s. 25 of the Judicature Act, 1873, overrules the decision of Wood V.-C. in *Earl Talbot* v. *Hope Scott* (1) and the law upon which he there relied and which is also to be found in some other cases. I was under the impression that such was the case, and that the point was beyond doubt. I was therefore surprised at the suggestion that there was no jurisdiction to appoint a receiver in a case of disputed title. But I am not bound to rely upon my own opinion alone, as I have the direct authority of the Court of Appeal in *Berry* v. *Keen*. (2)

Then it is said in this case that it is a matter of judicial discretion, and that the Court will not appoint a receiver when there is a person in possession. That it is a matter of judicial discretion I agree—that is to say, it is a discretion to be exercised by the judge subject to appeal. But I do not agree to the statement that the Court will never appoint a receiver where there is a person in possession. That is a fact, no doubt, to be taken into consideration, but in combination with all the other circumstances of the case. It seems to me to be impossible to lay down any rule for the exercise of the discretion: one must look at all the circumstances. I do know in the present case that the present plaintiffs and defendant have been engaged in long and severe litigation respecting property in the same county, and apparently supposed by some of them to be held under the same title, if not to form part of the same estate. That has gone through the various stages of a long trial and consideration by the learned judge who first heard it, and then it went to the Court of Appeal, and now I am told that it is going to the House of Lords, as both parties were dissatisfied

(1) 4 K. & J. 96, 139; 27 L. J. (Ch.) 273. (2) 51 L. J. (Ch.) 912.

with the decision, which was partly favourable to one, and partly to the other. Now they are litigating in respect to another estate in the same county, which may or may not be held under the same title. That is a very good ground for keeping the property in medio, especially when the impecuniosity of the defendant is also brought forward, and the case seems to me to be established. The only answer I have heard is that the plaintiffs also are impecunious, and that if they fail in the House of Lords, and the defendant becomes entitled to recover costs, they may not be able to pay, and that this is to be set off against the possibility of the defendant's not paying. I am not impressed with that. I think this is a case in which I ought to exercise my discretion by appointing a receiver. There will be an order accordingly, with a reference to chambers. The order must be in the usual form—that is, subject to the rights of prior incumbrancers.

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As the result of the above decision no order was made on the defendant's motion for an injunction, except that the costs of it should be costs in the action.

G. I. F. C.

The defendant appealed. The appeal was heard on November 18, 1896.

C. A.

Warrington, *Q.C.*, and *J. H. Boome*, for the appellant. This is not a case in which a receiver ought to be appointed. The action is a pure ejectment action; there is no allegation against the defendant that he has been guilty of fraud, or that he is wasting the estate. The plaintiffs have no such primâ facie case against the defendant as to make the appointment of a receiver proper. The only case made against him is that he is impecunious; and, apart from that, if an injunction is granted in this case it ought to be granted in every action of ejectment.

[They were stopped by the Court.]

Renshaw, *Q.C.*, and *Mark Romer*, for the plaintiffs. We say that it is just and convenient for a receiver to be appointed. The estates were set free by the death of Hartley in June, 1894, and then a scramble for possession of the estates of which

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he had been seised took place. The defendant got into possession immediately after the death; and shortly afterwards we commenced ejectment to recover estates which we considered to include these: so this is not like the case of a plaintiff coming against a person who has had long undisputed possession. The defendant in the Court below relied on *Earl Talbot* v. *Hope Scott* (1); but in *Berry* v. *Keen* (2) it was held that the Judicature Act, 1873, s. 25, sub-s. 8, had completely altered the rule, and enabled the Court to appoint a receiver whenever it was expedient. See also *Anglo-Italian Bank* v. *Davies*. (3)

Warrington, Q.C., in reply, was desired by the Court to confine himself to the question as to the circumstances under which the defendant took possession.

The defendant took possession as heir-at-law of the person last seised. His being such gives him a primâ facie title, and he stands in a very different position from a person who gets possession without any show of title immediately after an owner's death.

LORD RUSSELL of KILLOWEN C.J. In my opinion this appeal must be allowed. There is no question as to the jurisdiction of the Court to make such an order as that under appeal, for the 25th section of the Judicature Act, 1873, clearly empowers the Court to appoint a receiver where it is just or convenient that such an appointment should be made. This gives the judge a large discretion—a discretion, of course, to be judicially exercised—and I should be slow to interfere with the exercise of it by the judge of the Court below unless I were satisfied that it had not been properly and judicially exercised. In the present case, though it comes near the line, I am so satisfied.

The facts are as follows. The person last seised of this property died a lunatic in June, 1894, seised also of other estates. His affairs were considered in the lunacy, and it is conceded that the defendant is his heir-at-law. Of course, it does not follow from this that he is entitled to the property; but as he

(1) 4 K. & J. 96, 139; 27 L. J. (Ch.) 273.

(2) 51 L. J. (Ch.) 912.

(3) (1878) 9 Ch. D. 275, 286.

was recognised as heir-at-law, it was not unnatural that he should be prepared to take possession on the death of Hartley. He accordingly did take possession, and the tenants attorned to him. The plaintiffs soon afterwards brought against the defendant an action of ejectment which did not bring into dispute the title to this property. The Court of Appeal came to the conclusion that the plaintiffs were entitled to part of the property sought to be recovered in that action, and the defendant to the other part. Cross-appeals from both branches of that decision are pending in the House of Lords.

In that state of things the plaintiffs bring this second action of ejectment to recover property not the subject of the former action. They bring their action upon their legal title, which they have to establish, and the Court is then asked to appoint a receiver. On what ground should it do so? If it could have been said that the decision of the Court of Appeal in the plaintiffs' favour in the other action would be conclusive in the plaintiffs' favour if these estates had been included in that action, there might well be a case for a receiver. But it is not contended that any decision in the former case can cover this. What else is alleged? That on the death of Hartley there was a scramble for possession. But, the defendant having entered under his primâ facie title of heir-at-law, there was no scramble for possession in the sense in which that word may properly be used. Then it is said that the defendant is impecunious, that he has not paid the whole of the sum of 1400*l.* found due from him for mesne profits in the former action, though he has paid a great part of it, and that he has executed a bill of sale on the goods in his house in town. He evidently is not a man of very considerable means, and after this expensive and protracted litigation he may no doubt be considerably crippled; but is that any reason why, the property being safe, the defendant should be obliged to carry on this litigation without money? The plaintiff is the master of the litigation, and can to a considerable extent expedite it. We think, therefore, that no injustice will be done by allowing the defendant to remain in receipt of the rents of this property till the title to it is tried. The order, therefore, will be discharged.

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LINDLEY L.J. I am of the same opinion. I thought at one time that the case might be treated as practically one of vacant possession; but after hearing the reply, I am satisfied that this would not be a correct view. The defendant, who has been found in the lunacy heir-at-law of the person last seised, took possession bonâ fide as such, and I do not think that under the circumstances it is right to turn him out till his title has been adjudicated upon. I think that the learned judge below treated this too much as the case of a scramble, or as a case of vacant possession. The appeal must be allowed.

A. L. SMITH L.J. I am of the same opinion. It is said that on Hartley's death there was a scramble; but I cannot see that the defendant took part in any scramble. It was natural that, being Hartley's heir-at-law, he should take possession of this property on Hartley's death. Is it just, then, that he should be turned out of possession by the appointment of a receiver before any better title has been established? If it could be made out that the decision of the Court of Appeal as to the estate with respect to which the Court decided in the plaintiffs' favour covered the present case, that would alter the case, but nothing of the kind can be said. In my opinion, the defendant is entitled to fight this case against the plaintiffs, and it would not be just (I do not use the word convenient) to take away from him these rents and profits until the plaintiffs make out their title to the estates. The appeal should, in my judgment, be allowed.

Solicitors for appellant: *Collyer-Bristow, Russell, Hill & Co.*

Solicitors for respondents: *Robbins, Billing & Co., for James Clarke, Preston.*

H. C. J.

ROWLAND *v.* MITCHELL.
In re ROWLAND'S TRADE-MARK.

C. A. 1896 Dec. 2.

[1895 R. 1776.]

Trade-mark—Registration—Removal from Register—Proper Subject-matter—"Distinctive Device"—Portrait of Manufacturer—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1 (*c*).

The portrait of the manufacturer of goods is a "distinctive device" within the meaning of s. 10, sub-s. 1 (*c*), of the Patents, Designs, and Trade Marks Act, 1888, and may properly be registered as a trade-mark to be used by him in connection with his goods.

In re Anderson's Trade-mark, (1884) 26 Ch. D. 409, explained.

APPEAL against the judgment of Romer J. at the trial of the action, granting an injunction perpetually restraining the defendant, his servants, &c., from (in effect) passing off his goods as and for the goods of the plaintiff, and at the same time dismissing with costs a motion by the defendant to rectify the register of trade-marks by removing therefrom the plaintiff's trade-mark No. 155,638, class 42 (confectionery).

The plaintiff had also claimed an injunction to restrain the defendant from infringing or imitating the trade-mark; but the learned judge held that there had been no infringement or imitation, and declined to grant an injunction under this head.

The plaintiff was a manufacturer of and a wholesale dealer in some cough lozenges called "Army and Navy Paregoric Tablets," in connection with which he used the trade-mark.

The trade-mark was registered on April 14, 1891. It consisted of the plaintiff's own portrait inclosed in an oval line. Just inside the upper portion of the line, and so arranged as to correspond with its shape, were the words "The New Conqueror," and similarly arranged within the lower portion of the line were the words "Never known to fail." But the following statement and disclaimer appeared on the register: "The essential particular of my trade-mark is my portrait, and I disclaim any right to the exclusive use of the added matter."

The ground of the motion to expunge was, that the portrait

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of an individual was not a "distinctive device" within the meaning of s. 10, sub-s. 1 (*c*), of the Patents, Designs, and Trade Marks Act, 1888, and that it could not, therefore, be the proper subject-matter of a trade-mark.

In dealing with this point Romer J. said: "The only ground upon which the defendant's motion to expunge the plaintiff's trade-mark can be based is, that the trade-mark is not a 'distinctive device.' It is said that the photograph of the owner of a trade-mark is not distinctive, and is therefore not good subject-matter of a trade-mark. Reference was made to *In re Anderson's Trade-mark* (1), which, it was said, decided that a portrait cannot be good subject-matter of a trade-mark. In my opinion that case decided nothing of the kind. The chief part of the trade-mark there was a portrait of Baron Liebig with certain words added with reference to Liebig's Extract of Meat. It was held that the substance to which the trade-mark was intended to be attached was well known in the market as Liebig's Extract of Meat, and that the term 'Liebig' or 'Baron Liebig' was publici juris, and, that being so, what *In re Anderson's Trade-mark* (1) decided was, that, inasmuch as Baron Liebig's name applied to that substance was common to the world, no person could claim as a trade-mark that name, or a photograph of Baron Liebig, which was another method of describing the goods to which the trade-mark was to be attached. That was the ground of the decision in *In re Anderson's Trade-mark* (1), and it in no wise applies to the present case. The plaintiff's name is not publici juris. The substance to which his trade-mark is applied is not known in the market in the same way. I can see no reason why the photograph of a person who invents a trade-mark should not be itself distinctive; and in the case before me I think the photograph is distinctive. Of course, if the intention of the plaintiff was, that, by registering his portrait as a trade-mark he should prevent any one else from using as a trade-mark for similar goods any portrait whatsoever, I should have to reconsider what I have said. That could not be his intention so far as the mere trade-mark is concerned. The photograph of another person would not, in my opinion,

(1) 26 Ch. D. 409.

be an infringement of the trade-mark, if the photograph was substantially different from that of the plaintiff. It follows that the motion to expunge fails, and must be dismissed with costs."

The defendant appealed.

The present report is confined to the appeal from the refusal of the motion to expunge the trade-mark.

Oswald, Q.C., and *R. Edmondson*, for the defendant. The portrait of the manufacturer of goods is not a proper subject-matter for a trade-mark under s. 10 (1) of the Patents, Designs, and Trade Marks Act, 1888. It is not a "distinctive device" within the meaning of that section: *In re Anderson's Trade-mark*. (2) A "distinctive device" must mean something which distinguishes between the goods of the trader who uses it and the goods in the same class of any other trader. It must be something which the public can readily distinguish. Photographic portraits of different human faces are much alike, and the public would have great difficulty in distinguishing between them. Indeed, it may be doubted whether a portrait is a "device" at all. According to Johnson's Dictionary, a "device" is "a contrivance or invention."

Eve, Q.C., and *J. M. Gover*, for the plaintiff, were not called upon.

LORD RUSSELL of KILLOWEN C.J. The defendant raises three points. He says (1.) that this portrait is not a distinctive "device"; (2.) that the plaintiff is not entitled to relief by reason of his acquiescence in what has been done by the defendant; and (3.) that the plaintiff has been guilty of such misconduct in the use of the trade-mark as to disentitle him to the relief which he asks from the Court.

(1.) It is said that this trade-mark is not a "distinctive

(1) By s. 10, "(1.) For s. 64 of the principal Act" (i.e., the Patents, Designs, and Trade Marks Act, 1883) "the following section shall be substituted, namely—

"64. (1.) For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars (inter alia):

"(*c.*) A distinctive device, mark, brand, heading, label, or ticket."

(2) 26 Ch. D. 409.

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device" within sub-s. (*c*) of s. 10 of the Act. I think that it is. I will not attempt to improve upon the way in which Romer J. has dealt with this point. [His Lordship read the passage quoted above from the judgment of Romer J., and continued:—]

By "distinctive device" it is meant that the device must be something which shall be capable of distinguishing the particular goods in relation to which it is to be used from other goods of a like character belonging to other people. In that view it is difficult to conceive that anything could well be more distinctive than the portrait of the man who professes to manufacture the particular article. I come, therefore, to the conclusion that the learned judge was right in holding this portrait to be a proper subject for a trade-mark within s. 10 of the Act of 1888, and his judgment must be affirmed.

[His Lordship then dealt with the other two points, as to which he expressed his concurrence with Romer J., and said that the appeal must be dismissed.]

LINDLEY L.J. I agree on all the points. Mr. Oswald's first point would be a very important one if he could maintain it, namely, that a photograph of a human being cannot be a "distinctive device" within clause (*c*) of s. 10 of the Act of 1888. But we must be cautious before we assent to such a proposition as that. Why cannot the portrait of a human face be a "distinctive device"? We must be careful not to render this Act useless by cutting down the meaning of its language to the extent to which we are invited by Mr. Oswald. I can understand that he might be right if he had adduced evidence to shew that a portrait like this—a photograph more or less substantially like it—was common in the trade, so that it did not in fact distinguish, and could not be registered as distinguishing, the plaintiff's goods from other similar goods. There might be already on the register a face more or less like this, so that the registrar might properly say, "I cannot register another, because it is very likely to deceive." But, in the absence of any circumstance of that kind, I cannot conceive upon what ground we could justify a decision that a face like this cannot be registered because it is

not, or cannot be, a "distinctive device." Distinctive of what? The object is to distinguish the plaintiff's goods from other people's. Why cannot the plaintiff use this portrait, which has never been used before, to distinguish his goods from other goods of the same class—the goods of one maker from the goods of another maker—when it is registered and used for that purpose? I fail to appreciate the difficulty. I protest against the notion that we are to lay down as a general proposition that the photograph of a human face cannot be registered because it is not within the Act.

A. L. SMITH L.J. I agree.

Solicitors: *C. E. Oscar Walker; C. & E. Woodroffe.*

W. L. C.

In re STEPHENSON. DONALDSON *v.* BAMBER.

[1896 S. 1362.]

Will — Construction — Class — Member — Mistake — Gift of Residue to "the Children of the deceased Son (named B.) of my Father's Sister"—Several deceased Sons named B.—Uncertainty.

A testator by will gave the residue of his real and personal estate "unto the children of the deceased son (named Bamber) of my father's sister share and share alike." There were three deceased sons all named Bamber of the sister of the testator's father, and this fact was known to the testator:—

Held, by the Court of Appeal (reversing the decision of Kekewich J.), that the gift was void for uncertainty.

Hare v. *Cartridge*, (1842) 13 Sim. 165, and *Lee* v. *Pain*, (1844) 4 Hare, 201, 249, commented on and distinguished.

APPEAL from Kekewich J.

Robert Stephenson, who died on April 13, 1896, by his will, dated March 23, 1896, gave all the residue of his real and personal estate "unto the children of the deceased son (named Bamber) of my father's sister share and share alike." The testator's father had only one sister, namely, Rebecca, who married William Bamber, survived her husband, and died in 1861, having had three sons, namely, William Bamber, Rowland

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Bamber, and Drury Bamber, all of whom had died some years before the date of the will, each leaving several children living at the death of the testator; and the evidence shewed that the testator was aware of these facts. There were thus three deceased sons named Bamber of the testator's father's sister, and this was an originating summons taken out under Order LV., r. 3, by the sole executor of the will against a child of each of the three deceased sons, and a representative of the next of kin, to determine who was entitled to the residue of the testator's estate under the gift contained in the will.

The summons was adjourned into court, and came on for hearing before Kekewich J. on July 8, 1896.

Dibdin, for the plaintiff.

Bramwell Davis, *Q.C.*, and *W. F. Webster*, for the children of the three deceased sons of the testator's father's sister.

Warrington, *Q.C.*, and *Cave*, for the representative of the next of kin, referred to *Doe* v. *Joinville* (1) and *Dowset* v. *Sweet*. (2)

KEKEWICH J. This case is one primæ impressionis, and upon which several judges in succession might well come to different conclusions. The case of *Doe* v. *Joinville* (1), cited by Mr. Warrington, is one of undoubted authority, but it does not lay down any principle. It merely illustrates by reference to a particular will the principle on which the Court always desires to act—that is, to endeavour to ascertain the meaning of ambiguous language in a testator's will, and construe it as well as can be done, giving effect to every word, and as far as possible grammatically; if, unfortunately, the Court cannot go so far as that, then the result which it desires to avoid follows, and the gift is held void for uncertainty. Here I have a gift which, when the facts are known, is very difficult to construe—a gift to the children of "the deceased son" of the testator's father's sister. There were three sons, and it is argued with force that the Court cannot say that any one of the three was "the deceased son"; and, of course, if that conclusion is once arrived

(1) (1802) 3 East, 172. (2) (1753) Amb. 175.

at, it is impossible to give the property to any number of children as being the children of "the deceased son." The definite article points to a definite person, and the singular number to one person only. So far there is very great difficulty. But testators do not use exact language any more than counsel or judges do, and their slips are sometimes intelligible, notwithstanding that they are ungrammatical. Still I confess that if the will stopped there, I could not see my way out of the difficulty. But I think that the testator here has given a key which shews what his intention was, and enables me to get at his meaning, and to get over the use of the definite article. The gift is to the children of the deceased son "named Bamber." The object of his bounty was the children named Bamber, and I see no insuperable difficulty in holding that every child named Bamber being the child of a deceased son can take. In saying so I am attaching the words "named Bamber" to the whole phrase "children of the deceased son," and it is not the son that is to be named Bamber but the children. The children of a deceased son, unless they were married daughters, would be named Bamber. I think the testator has said, not in the language of a clear-headed draftsman, but with sufficient clearness, "I desire my bounty to fall on the children of a deceased son of my father's sister who are named Bamber." He having told us that it is the Bambers whom he wishes to benefit, I think I can give effect to his intention in the way I have indicated. The case is a puzzle which I have to deal with to the best of my ability, and I shall not be surprised if others think differently.

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The defendant, the representative of the next of kin, appealed. The appeal was heard on November 26, 1896.

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Warrington, *Q.C.*, and *Cave*, for the appellant. There is no ambiguity on the face of the will. The testator has given his residuary estate to "the children of the deceased son named Bamber" of his father's sister. That is a gift to the children of an individual. The use of the singular number clearly shews the intention of the testator to benefit the children of one son

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only, and the Court cannot alter the singular into the plural and construe the gift as a gift to the children of all the sons named Bamber. It is, however, impossible to say which deceased son named Bamber was meant by the testator, and the gift is void for uncertainty: *Doe* v. *Joinville*. (1)

Bramwell Davis, *Q.C.*, and *W. F. Webster*, for the respondents, the children of the three deceased sons. The testator has made a mistake in using the word "son" in the singular number instead of the word "sons" in the plural, and the Court will correct it, so as to carry out his obvious intention. That intention was to benefit his first cousins once removed of the name of Bamber. The case is covered by *Hare* v. *Cartridge* (2), which shews that the gift should be construed so as to let in the children of all the deceased sons.

[LINDLEY L.J. Is not that decision opposed to the other authorities upon the question? See 1 Jarman on Wills, 4th ed. p. 376.]

It has never been overruled. The testator has shewn an intention to benefit a class, but has incorrectly enumerated the persons to be benefited, and the case falls within the principle of the authorities which lay down that under such circumstances the Court will reject the enumeration in order to carry out the intention of the testator: *Lee* v. *Pain* (3); *Garvey* v. *Hibbert* (4); *McKechnie* v. *Vaughan* (5); *Harrison* v. *Harrison* (6); *Daniell* v. *Daniell* (7); *Newman* v. *Piercey* (8); *Mellor* v. *Daintree*. (9)

Dibdin, for the executor.

Warrington, *Q.C.*, in reply. The rejection of the numeral is confined to the case of a gift to a class; but for the purpose of construction this is the case of a gift to an individual, because an individual is the stirps of the class. The distinction between the two cases is obvious. In *Hare* v. *Cartridge* (2) the words were different, namely, "the children of his father's brother of the

(1) 3 East, 172.
(2) 13 Sim. 165.
(3) 4 Hare, 201, 249.
(4) (1812) 19 Ves. 125.
(5) (1873) L. R. 15 Eq. 289.
(6) (1829) 1 Russ. & My. 72.
(7) (1849) 3 De G. & Sm. 337.
(8) (1876) 4 Ch. D. 41.
(9) (1886) 33 Ch. D. 198.

name of Cartridge," and the case stands alone. It is inconsistent with all the other authorities, and ought not to be followed.

LORD RUSSELL of KILLOWEN C.J. The question in this case is whether the residuary gift in the will of the testator is effective, or whether it is void for uncertainty. If effective, according to the construction sought to be placed on it by the respondents, the residue would go to the children of each of the deceased sons of the testator's father's sister, Rebecca Bamber. If it is void for uncertainty, it goes, according to the Statute of Distributions, among the next of kin. We have to determine what the testator's intention was; but we are to gather that intention from what he has said in his will, giving effect, so far as possible to each word that he has used therein. We are not to make a will for him, but we are to give effect to the intention which is to be gathered from what he has said in his will. There may be cases in which the Court will supplement the evidence of the will itself, and the terms of the will itself, as to the testator's intentions; and those cases I think may be described as principally two.

First, there may be extrinsic facts which will help the Court to determine what the testator meant. For instance, to give the illustration which I suggested a few moments ago, if extrinsic evidence had been forthcoming to shew that the testator knew that there was only one deceased son, that might be a circumstance to be taken into consideration in construing the language in which the will is couched. But that is not this case.

And there is the other case in which evidence of intention may be given; but that, I gather, is limited, as stated in the 7th proposition of Sir James Wigram in his book on Wills. Perhaps I had better also read the 6th proposition (Wigram's Extrinsic Evidence in aid of the Interpretation of Wills, 4th ed. p. 94): "Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will" (except in certain special cases: see proposition 7) "will be void for uncertainty."

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Then, on that general proposition, follows this exception, in proposition 7 (Wigram, p. 109): "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning,—Courts of Law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition (i.e., the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." In other words admissible for the purpose of identity of the subject or identity of the object.

In my judgment the facts of this case do not bring the present case within the principle enunciated in that 7th proposition. These are the facts. After some other dispositions the testator proceeds in this language: "I give devise and bequeath the same" (that is, his residuary estate) "unto the children of the deceased son (named Bamber) of my father's sister share and share alike." That is to say, he bequeaths his residue to the children of his deceased cousin. Now, what does that mean? At the time that this will was made there were three deceased sons (named Bamber) of his father's sister, and I think the evidence establishes that the testator was aware of this fact. How, then, are those words to be construed? The learned judge has, first of all, transposed the words "named Bamber," which are the qualification of the deceased son, so that they may follow the word "children" and become a qualification of the children; so that it runs, "unto the children named Bamber," and then he proceeds to change the single noun "son" into the plural noun "sons"; so that it would, according to his construction, read thus: "I give devise and bequeath the same unto the children (named Bamber) of the deceased sons of my father's sister share and share alike."

In my judgment that would be making a new will. On the face of this will there is no apparent ambiguity in it at

all. The ambiguity arises when it is sought to apply the will to the extrinsic state of facts that we know existed, namely, that there were three deceased sons named Bamber, each of which three deceased sons had children. Now, can this construction be supported? I think it cannot. I think the cases have gone a very long way, and have been so long established that they cannot now be disturbed; but I think they have gone as far as they ought to go, to say the least of it; and I for one am not disposed to assist their going further.

But it is said that this case comes within the principle of a number of cases—authorities which establish, as is contended, this proposition: that, wherever there is an enumeration of persons to be benefited and that enumeration is erroneous and does not tally with the facts, the Court may reject the enumeration. I think that is stating the proposition much too widely. I think the proposition must be limited to this—that, where the Court, as a matter of construction, arrives at the conclusion that a particular class of persons is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the Court will reject the enumeration. I think the principle of the cases goes no further than that.

Now, does that principle apply here? I think it does not; and I think the illustration the learned counsel gave in the course of his argument is a very proper one by which to test the proposition. Suppose there had been in terms a devise and bequest unto the son of my father's sister, could the Court, there being three sons of his father's sister living at the time the will was made, and in the absence of any extrinsic admissible evidence arrive at the conclusion that that meant, not the deceased son, but the deceased sons? The Court could not, I think, arrive at that conclusion. The Court would in that case be bound to say that the bequest was uncertain, and therefore void, and accordingly that the property must be left to be dealt with by the Statute of Distributions.

Further, it is said that there is one authority which is in point here—namely, the case of *Hare* v. *Cartridge*. (1) I do not stop

(1) 13 Sim. 165.

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to point out that text-writers of authority in referring to this case have appended to it the observation that the current of authority is against it. It is the fact, as the learned counsel who were supporting this residuary bequest have said, that it cannot be treated by this Court as having been overruled by any other decision, and therefore I proceed to examine it. The case was decided by Sir Lancelot Shadwell, the last Vice-Chancellor of England, and the testator in it bequeathed his residue to "my first cousins, the children of my father's brother of the name of Cartridge." It turned out that in fact the testator's father had two brothers of the name of Cartridge, both of whom left children; and the Court came to the conclusion, as a matter of construction, that, seeing there was the manifest intention in the earlier part of the bequest to leave the residue to "his first cousins," it would be a proper construction to omit the words "children of my father's brother," and to treat it as if the gift were to his first cousins bearing the name of Cartridge. I do not stop to say whether it was right or wrong. It seems a strong thing to have done, and a construction which does not, I confess, commend itself to my judgment; but, at all events, I have said enough to shew that the case is essentially different from that we have here to deal with.

I think in this case the Court cannot hold that there is no uncertainty as to what the testator meant; and that being so, and the uncertainty not being capable of being removed by any legitimate legal evidence, there must be a declaration that the residuary bequest is void for uncertainty, and the result will be that the subject-matter of the bequest will go to the next of kin. As this question has been properly raised by the executor, the costs will come out of the estate.

LINDLEY L.J. I am of the same opinion. When one comes to look at the will and understand the facts one sees the difficulty of arriving at what the testator really meant. [His Lordship then read the bequest in the will, and continued:—]

We are asked to say that what I have read ought to be construed as a bequest of the residue to the children of all the three deceased sons. I think that would be a strong thing to

do. We are not asked to say that the evidence shews that the testator meant any one of those three sons rather than the other. Parol evidence would be admissible to shew that; but we are not asked to say that. We are asked, either by means of extrinsic evidence or without, to say that "the deceased son" means all the deceased sons. In my opinion, we cannot arrive at any such conclusion except under the compulsion of authority; and when the cases, such as *Hare* v. *Cartridge* (1) and *Lee* v. *Pain* (2), are looked at they are authorities for nothing more than this: that, under such circumstances as I am about to suppose, the Court may reject an inaccurate enumeration. If the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court should not and will not defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration. But if we reject an inaccurate enumeration here we shall not have anything left at all. What we are asked to do is to put in something which those cases do not warrant. What we are asked to say is that, although there is here no inaccurate enumeration, the bequest to the children of a deceased son, naming one, means a bequest to the children of three people. How can we do that? The cases do not drive us to do that, and to my mind common sense is opposed to it. As regards *Hare* v. *Cartridge* (1), there was language which assisted the construction arrived at, and that language is wanting here. The words there were "my first cousins," which we have not got here. If we had "unto my cousins, the children of the deceased son," *Hare* v. *Cartridge* (1) would be, so far as I can see, exactly in point. I doubt then whether it would be right, but we have not even that to assist us here. We are not, therefore, driven to do that which I think is contrary to the plain common sense of this will; and I will say no more than that Kekewich J. appears to have fallen into the error of putting the name Bamber to the wrong antecedent. I think the appeal ought to be allowed, and that there is a case of intestacy.

(1) 13 Sim. 165. (2) 4 Hare, 201, 249.

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A. L. SMITH L.J. The question in this case is whether the residuary bequest is void for uncertainty. [His Lordship then read the terms of the bequest, and continued :—]

To whom does that residuary real and personal estate go? If there was one son, it would go to his children. But there are three, and it is impossible to say to whom it goes. The testator has not said, and why is the Court to say, to which of the three it is to go, or indeed how can it except by guessing?

It is contended that there is a rule of construction that where a gift is to a class and the class has been wrongly enumerated, e.g., when the gift is to four, five or six persons, whereas in reality there are seven or eight or nine, the true construction is that, inasmuch as it is the intention of the testator to benefit the class as a whole, the Court will leave out the numeral, which does not fit the class, and regard the bequest as one to the class with the numeral struck out. I think from the cases there is such a rule. Sir George Jessel has pointed out the rule in the case of *Newman* v. *Piercey* (1), namely, that if there is a gift to a class and the number of that class is wrong, then the Court strikes out the number and reads the bequest as if the number had not been in at all. But when these authorities are looked at they are cases in which something is struck out from the will. Here we are not asked to strike anything out, but to say that when a testator devises and bequeaths the residue of his real and personal estate "unto the children of the deceased son of my father's sister," he meant to say, "unto the children of the deceased sons" (who happened to be three) "of my father's sister." I can find no authority for adding anything to a will. There is authority for expunging or striking out a numeral; but this case appears to me not to fall within the doctrine of those cases; and I think this gift is void for uncertainty, and that my brother Kekewich was wrong in holding he could see what the testator meant and make a will for him. I cannot.

Solicitors: *Bridges, Sawtell, Heywood & Co.; Purkis & Co., for Frank Searby, Ilkeston.*

(1) 4 Ch. D. 41.

W. W. K.

In re ROBINSON. WRIGHT *v.* TUGWELL.

C. A. 1896 Nov. 20, 28.

[1889 R. 1854.]

Will—Charitable Legacy—Gift for Endowment of Church—Continuing Condition — Ecclesiastical Law — Clergy—"Preaching"—"Ministration"—"Ornaments of the Minister"—Black Gown in Pulpit—Custom—Long Usage.

A testatrix bequeathed 1500*l.* towards the endowment of a church, provided certain conditions were carried out in every particular, and under this stipulation alone was her executor empowered to pay it. One of the conditions, called by the testatrix an "abiding condition," was "that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal."

The fund being in court in an action to administer the estate of the testatrix:—

Held, by the Court of Appeal (Lord Russell of Killowen C.J., Lindley and A. L. Smith L.JJ.), agreeing with North J., [1892] 1 Ch. 95, that the condition was a continuing condition, so as to entitle the incumbent of the church to the income of the fund from time to time so long as he performed the condition.

It is not illegal for a clergyman of the Church of England to wear a black gown in the pulpit when preaching, the legality of the black gown in preaching being sanctioned by the continuous usage of centuries uncontrolled by positive law or judicial decision.

Decision of North J. affirmed.

Dictum of Sir R. Phillimore in *Elphinstone* v. *Purchas*, (1870) L. R. 3 A. & E. 91, disapproved of.

Ridsdale v. *Clifton*, (1877) 2 P. D. 276, considered.

THE question now raised in this case, reported at a former stage (1), was whether it is illegal for a clergyman of the Church of England to wear a black gown in the pulpit when preaching.

The order of November 3, 1891, made by North J. on the former occasion, declared that the sum of 1500*l.* had been effectually disposed of by the testatrix, Frances Rebecca Robinson, out of the residue of her pure personal estate, towards the endowment of a church called in the order the "Bournemouth church," being the church indicated in the will as the "proposed Evangelical church at Bournemouth." The order

(1) [1892] 1 Ch. 95.

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accordingly went on to direct that the 1500*l.* should be carried over to an account entitled "The 1500*l.* Endowment Fund for the proposed Bournemouth Church"; and that the incumbent for the time being of the said Bournemouth church, and all persons interested in the fund so directed to be carried over, should be at liberty to apply as to the capital or income thereof as they might be advised.

The church referred to in the order was eventually erected and consecrated under the name of "St. John the Evangelist, Boscombe," and the Rev. Sydney Augustus Selwyn was appointed vicar by the Peache trustees, the patrons of the living. He assented to the conditions annexed by the testatrix, by letter, to her gift towards the endowment of the church as stated in the former report, with the exception of the condition as to the wearing of the black gown in the pulpit, which he declined to comply with. Colonel Wright, the sole executor of the will, insisted on the condition; and accordingly, with a view to raising the question for the decision of the Court, Mr. Selwyn, under the liberty to apply given by the order, took out a summons asking that the dividends which had accumulated on the 1500*l.* in court might be paid to him, and also that the dividends, as they accrued due on the fund, might be paid to him so long as he remained incumbent of the said church. He had not yet actually signed any of the conditions of the gift.

The summons was adjourned into court for argument, and on June 25, 1896, North J. made an order dismissing the application with costs, expressing the opinion that the point was covered by his previous decision, already reported.

Mr. Selwyn appealed from that order.

The appeal was heard on November 20, 1896.

Dibdin, for the appellant. First, this is a condition precedent, and it is an impossible condition, for it is a condition to be carried out to all time. Being, then, an impossible condition, the gift takes effect without it: Jarman on Wills, 5th ed. p. 852.

[LINDLEY L.J. North J. has held that it is not a condition precedent but continuing; and I think he is right.]

[*Fossett Lock*, for the executor, submitted that the matter was res judicata, having been decided five years ago by North J., and, as there had been no appeal from that decision, it could not be reopened.]

It is not a case of res judicata at all. I am applying under the order which gave me leave to apply for the payment of the income of the fund.

[LORD RUSSELL C.J. Yes, I think we must hear you.]

I submit that the condition as to the black gown is bad altogether, because a black gown in the pulpit is an illegal vestment for a clergyman of the Church of England. The law on the subject is contained in the Act of Uniformity, 1 Eliz. c. 2 (1558–9), and the Advertisements thereunder. The Act contains the following enactment, s. 13 in Stat. Rev. and s. 25 in statutes at large: "Provided always . . . . that such ornaments of the Church and of the ministers thereof shall be retained and be in use as was in this Church of England by authority of Parliament in the second year of the reign of King Edward the Sixth, until other order shall be therein taken by authority of the Queen's Majesty, with the advice, &c." "Other order" was taken by the Advertisements of Elizabeth, issued in 1564: *Ridsdale* v. *Clifton* (1); these Advertisements ordering (2) that "Every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish." According to the judgment of the Privy Council in *Ridsdale* v. *Clifton* (3) that order must be read into the section of the Act of Uniformity as requiring that "the surplice shall be used by the ministers of the Church at all times of their public ministrations."

That was the law from 1564 to 1662, and the decision of the Privy Council in *Ridsdale* v. *Clifton* (1) is that from 1662 to the present time there has been no change in the law as regards the wearing of the surplice by the ministers of the Church "at all times of their public ministrations"; and the present Ornaments Rubric at the beginning of the Book of Common Prayer—"And here is to be noted, that such ornaments of

(1) 2 P. D. 276. (2) 2 P. D. 316. (3) 2 P. D. 321.

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the Church and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward the Sixth"—is merely a recapitulation or summary of that law. Then the question is whether preaching is a "ministration" within that Rubric and within the decision in *Ridsdale* v. *Clifton*. (1) I submit that it is. The sermon is not part of Morning or Evening Prayer. The only legal time for the sermon is in the Communion Service, and during that service a surplice must be worn. The sermon comes in at the middle of that service, immediately after the Nicene Creed, as directed by the following Rubric: "Then shall follow the Sermon, or one of the Homilies already set forth, or hereafter to be set forth, by authority." The sermon is thus part of the Communion Service, and there is no direction or authority that the minister shall change his vesture during that service: he must wear the surplice throughout. In fact, a surplice is the proper vestment for an officiating minister at all times: *Hebbert* v. *Purchas*. (2)

[LINDLEY L.J. Then, although the black gown has been in use for 300 years, that is all wrong. Have you never heard of the maxim, "Communis error facit jus"?]

Until *Ridsdale* v. *Clifton* (1) the law was uncertain; but now that the law has been construed by the highest authority the clergy are bound to follow it. That preaching is a "ministration" is, I submit, clear from Article 23 of the Articles of the Church of England, which is headed "Of Ministering in the Congregation," and runs as follows: "It is not lawful for any man to take upon him the office of publick preaching, or ministering the Sacraments in the congregation, before he be lawfully called, and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have publick authority given unto them in the congregation, to call and send ministers into the Lord's Vineyard." Also in Article 26, headed "Of the unworthiness of the ministers," there occurs the expression, "the ministration of the Word and Sacraments." Therefore,

(1) 2 P. D. 276. (2) (1871) L. R. 3 P. C. 605, 645.

having regard to the Articles, it is impossible to say that preaching is not a "ministration." The only expression of judicial opinion to be found on the question of the legality of the black gown is a dictum of Sir R. Phillimore in *Elphinstone* v. *Purchas* (1), where, in dealing with the argument that the admitted disuse of ornaments since the Restoration removed all doubt as to the meaning of the Ornaments Rubric, his Lordship said: "In truth, however, the argument is bad from the vice of proving a great deal too much; the same argument would make the copes in the cathedrals unlawful, which, it is admitted, they are not; the use of the surplice in preaching unlawful, which is the proper dress; and è converso would establish the legality of the use of the black gown, which has no warrant of law."

Since the judgment in *Ridsdale* v. *Clifton* (2) the text-books, which in previous editions had advocated the use of the black gown, have been unanimous in prescribing the surplice as the proper preaching dress: Cripps' Law of the Church and Clergy, 1886, 6th ed. (pp. 423–4), from which a passage in the 5th ed. of 1869 (p. 706) defending the use of the black gown is omitted; Prideaux's Churchwarden's Guide, 1895, 16th ed. (p. 393); Dale's Clergyman's Legal Handbook, 1881, 6th ed. (p. 103); the ground of the statements by the several writers being that, having regard to the judgment in *Ridsdale* v. *Clifton* (2), preaching is a "ministration" within the Ornaments Rubric. In Dale's Legal Ritual (1871, Introd. p. xii.), the use of the black gown is pronounced to be "clearly illegal," on the authority of Sir R. Phillimore's dictum in *Elphinstone* v. *Purchas*. (1) The result has been that since the decision in *Ridsdale* v. *Clifton* (2) the black gown has practically disappeared from the pulpit, not from fashion or chance, but because that decision makes it impossible for a clergyman seeking to obey the law to wear a black gown.

This is a charitable trust, and a scheme may be sanctioned by the Court, if necessary, dispensing with the several conditions imposed by the testatrix.

Fossett Lock, for Colonel Wright, the executor of the will, and representing the residuary legatees or next of kin. First,

(1) L. R. 3 A. & E. 91. (2) 2 P. D. 276.

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I submit that the present contention is not now open to the appellant, for the question as to the legality or illegality of the black gown was distinctly argued in 1891 before North J., who held that the condition was not illegal. The point therefore being res judicata, the appellant is estopped by that decision: *Serrao* v. *Noel.* (1)

[Lord Russell C.J. It is open to Mr. Dibdin to say "The condition is illegal, and I am not bound to comply with it."]

Dealing then with the effect of the judgment in *Ridsdale* v. *Clifton* (2): the Privy Council held (3) that, in considering an ecclesiastical question of this kind, in which there was an absence of express law, the maxim "Contemporanea expositio fortissima est in lege" must be applied, and that "a Church Rubric, taking the form of directions to be acted on by large numbers of persons from week to week, and from day to day, is a subject above all others for exposition by contemporaneous and continual usage." So also in *Hebbert* v. *Purchas.* (4) The Rubrics of the Book of Common Prayer are confined to the several ministrations or services thereby expressly provided for, namely, Morning and Evening Prayer, Holy Communion, baptism, and burial, and have no reference to preaching.

[A. L. Smith L.J. It seems that, in delivering the judgment of the Court in *Ridsdale* v. *Clifton* (2), Lord Cairns was not dealing with preaching at all.]

That is so. Applying then the rule laid down by the Privy Council, I can shew that from 1559 to about the year 1867 it was the uniform custom of the clergy to preach in a black gown. There has always been a distinction drawn between "preaching" and "ministering"; the right of "ministering" being conferred by ordination, and of "preaching" by licence of the bishop. The distinction is shewn as early as 1559, in Injunction 36 of Elizabeth; and it has been recognised by statute as recently as 1860, in the Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32), s. 2: *Cope* v. *Barber.* (5) This distinction, therefore, has existed for the last 300 years. There is no express direction to be found either in the Canons, Advertise-

(1) (1885) 15 Q. B. D. 549.
(2) 2 P. D. 276.
(3) 2 P. D. 331.
(4) L. R. 3 P. C. 605, 650.
(5) (1872) L. R. 7 C. P. 393, 401.

ments or Rubrics as to the dress or vestment to be worn during the sermon, and it is therefore necessary to look to "contemporaneous and continual usage." The Advertisements of 1564, in prescribing "Articles for outward apparel of persons ecclesiastical," as well as "Articles for administration of prayer and sacraments," directs that the clergy "shall wear in their common apparel abroad a side gown with sleeves" (1 Card. Doc. An. p. 329). It is therefore legitimate to appear in church in that gown unless some other dress is prescribed by a rubric. Again, in 1559, Injunction 30 of Elizabeth (1 Card. Doc. An. p. 225)—which also shews the distinction between "preaching" and "ministering"—directs that, in order to have the prelacy and clergy had in reverence and "to have them known to the people in all places and assemblies, both in the Church and without . . . . all archbishops and bishops, and all other that be called or admitted to preaching or ministry of the sacraments . . . . shall use and wear such seemly habits, garments, and such square caps, as were more commonly and orderly received in the latter year of the reign of King Edward the Sixth." The ordinary dress of the clergy is also prescribed by the 74th Canon of 1603–4 (1 Card. Synod. p. 288). As to the dress to be worn by the clergy during their "ministrations," the Advertisements of 1564 prescribe "that every minister saying any public prayers, or ministering the sacraments or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish" (1 Card. Doc. An. 326; 2 P. D. 316). And the 58th Canon of 1603–4 (1 Card. Synod. 280) is to the same effect. Then the Canon of 1571 (1 Card. Synod. 126–7), directing the use of the dress prescribed by the Advertisements of 1564, though it had no binding effect, shews the recognised usage of the time. There is no canon, advertisement or injunction whatever prescribing that the surplice shall be used during the sermon, and "contemporaneous and continual usage" for 300 years is against the surplice and in favour of the black gown. For instance, in the seventeenth century, so much was it the custom of the time to preach in the black gown, that in the year 1640, Wren, Bishop first of Norwich and then of Ely, was impeached

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by the Long Parliament, while in the See of Norwich, "for being popishly and superstitiously affected," the 12th article read against him being that in the year 1636 he had ordered his clergy in the diocese of Norwich to preach in a surplice, "a thing not used before in that diocese" (4 Cobbett's State Trials, p. 27). The express ground of the impeachment was breach of usage. Again, from 1559 to 1662, the date of the present Prayer Book, and subsequently, the Visitation Articles of the Bishops clearly shew that it was the custom of the day to wear the black gown in preaching, the usage being enforced by the bishops by requiring the presentment of any breach, and the questions throughout being framed upon the canonical distinction between "ministering" and "preaching." In short, the surplice was required in ministering any "rite of the Church," and the black gown was the accustomed dress for "preaching," which is not a "rite of the Church." It is remarkable also that in 1562, the very Convocation that drew up the Thirty-nine Articles in their present form, attended the Communion Service at St. Paul's, when the preacher, Day, Provost of Eton, preached "in the habit of a bachelor of divinity": that is to say, in the academical gown and hood: Strype's Annals, vol. xix, Life of Parker, vol. i. p. 240.

[*Dibdin.* I admit that from 1564 to about 1867 the black gown was in common use.]

As to Sir R. Phillimore's dictum in *Elphinstone* v. *Purchas* (1), he declines to accept the argument that admitted usage affords a "contemporanea expositio," whereas the Privy Council have since decided in *Ridsdale* v. *Clifton* (2) that usage is to be regarded; and usage establishes the legality of the black gown. The black gown, in fact, is the ordinary academic attire, and the "ornaments" prescribed by the Act of Uniformity and the Rubric, as construed by the Privy Council in *Ridsdale* v. *Clifton* (3), are vestures or ornamental additions to be worn by the clergy in addition to the ordinary dress during their "public ministrations."

Dibdin, in reply.

Cur. adv. vult.

(1) L. R. 3 A. & E. 91. (2) 2 P. D. 276. (3) 2 P. D. 321.

1896. Nov. 28. The judgment of the Court (Lord Russell of Killowen C.J., and Lindley and A. L. Smith L.JJ.) was delivered by

A. L. Smith L.J. This is an application by the Rev. Sydney Augustus Selwyn, who is the incumbent for the time being of the church of St. John the Evangelist, Boscombe, Bournemouth, for an order for the payment to him of accrued and accruing interest upon a sum of 1500*l.* standing to the credit of a separate account, called "The 1500*l.* Endowment Fund for the proposed Bournemouth Church." North J. refused to make the order, and the Rev. Mr. Selwyn appeals. Mrs. Frances R. Robinson, by her will, dated September 28, 1889, directed that the residue of her property should be paid, as to 1500*l.* thereof, towards an endowment for a proposed Evangelical church at Bournemouth, provided conditions as laid down for Christ Church, Paignton, were carried out in every particular; and under that stipulation alone was her executor empowered to pay the 1500*l.* out of her residuary estate towards the endowment of the proposed church at Bournemouth. The conditions upon which the testatrix made her gift towards the endowment of Christ Church, Paignton, so far as material to the point under consideration, were that she made it an "abiding condition" that the black gown should be worn in the pulpit, unless there should be any alteration in the law rendering it illegal; secondly, that the condition as to wearing the black gown in the pulpit should be signed by any incumbent who might be appointed to the church. The Rev. Mr. Selwyn does not propose to wear the black gown when preaching in the Bournemouth church, which has now been built, nor has he signed the prescribed conditions, but he insists that he is, nevertheless, entitled to the endowment. I do not doubt that North J. arrived at a right conclusion when he held that the condition about wearing the black gown in the pulpit was not an impossible condition, and that it was a continuing condition: see *In re Robinson, Wright* v. *Tugwell* (1); and I have nothing more to say as to this.

It is now argued on behalf of Mr. Selwyn that the condition

(1) [1892] 1 Ch. 95.

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is illegal—that it is illegal for a clergyman of the Church of England to wear a black gown in the pulpit when preaching. I think that North J. held that it was not; but we gave Mr. Dibdin, although out of time, leave to argue this point for Mr. Selwyn. The point when taken struck me as novel, for it is impossible to shut out from one's recollection the time when to preach in a black gown was the rule and not the exception in the Church of England, and also the many bitter strifes which have taken place, not as to whether the use of the black gown in the pulpit was illegal, but whether the use of what have been called "ritualistic vestments," which, it was said, trenched upon the ordained simplicity of the vesture of the clergy when officiating in the Church of England, was lawful. Mr. Dibdin insisted that the use of the black gown in the pulpit was illegal; but he had to admit that, until the present application, no case could be found in the books in which any objection to the use of the black gown in the pulpit as being illegal had been made. No statute, no rubric, no advertisement, no injunction, and no canon, could he point to which enacted or prescribed that to preach in the black gown was prohibited and therefore illegal; and he had also to admit that for a period of three centuries, from 1564 down to a comparatively recent date, there had been a contemporaneous and continual user of the black gown in the pulpit by clergymen of the Church of England when preaching. He, however, asserted that the judgment of the Privy Council delivered by Lord Cairns in 1877 in the case of *Ridsdale* v. *Clifton* (1) had held the black gown to be illegal; which assertion, remembering the history of the time, struck me as remarkable.

Now, what was it the Privy Council were adjudicating upon in *Ridsdale* v. *Clifton*? (1) It was, so far as regards the question of vestments, whether the wearing during the service of the Holy Communion of vestments known as an alb and a chasuble were lawful. Throughout the whole of the case, which was most elaborately argued, and equally elaborately adjudicated upon, there is not even an allusion to the black gown, nor to what a clergyman was or was not to wear in the

(1) 2 P. D. 276.

pulpit when preaching. Mr. Dibdin has seized upon a passage in the judgment, in which it said (1): "Reading, then, as their Lordships consider they are bound to do, the order as to vestures in the Book of Advertisements, into the 25th section of 1 Eliz. c. 2, and omitting (for the sake of brevity) all reference to hoods, it will appear that that section, from the year 1566 to 1662, had the same operation in law as if it had been expressed in these words:—

'Provided always that such ornaments of the Church and of the ministers thereof shall be retained and be in use as were in this Church of England by authority of parliament in the second year of King Edward VI., except that the surplice shall be used by the ministers of the Church at all times of their public ministrations, and the alb, vestment or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral and collegiate churches.'"

The Advertisement which I understand Lord Cairns was alluding to was, "Every minister saying any public prayers, or ministering the Sacraments, or other rites of the Church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish." (2) It is obvious that this Advertisement does not embrace the time of preaching, but only the saying of public prayers and ministering the Sacraments or other rites. The passage in the judgment relied upon was not aimed at, nor was it intended to be aimed at, preaching in the pulpit: it had reference to the saying of public prayers and ministering the Sacraments and other rites, and to those alone. It is wholly incorrect to say that either the judgment in *Ridsdale* v. *Clifton* (3), or the passage relied upon, has decided that the use of the black gown in the pulpit was illegal: it was not even discussed, much less adjudicated upon.

It was then argued that although the Privy Council in *Ridsdale* v. *Clifton* (3) might have been dealing, not with preaching in the pulpit, but only with the saying of public prayers and the administration of the Sacraments and other rites, yet, as preaching a sermon from the pulpit was part of the Order in the Prayer Book of the Administration of the Lord's Supper or Holy Communion, it was consequently part

(1) 2 P. D. 321. (2) 2 P. D. 316.
(3) 2 P. D. 276.

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of the ministration of the Sacrament of the Lord's Supper, and thus came within the decision of *Ridsdale* v. *Clifton*. (1)

It was said that in the Order of the Administration of the Lord's Supper or Holy Communion in the Prayer Book there would be found after the Nicene Creed this rubric: "Then shall follow the Sermon, or one of the Homilies already set forth, or hereafter to be set forth, by authority"; and that as during that part of the Communion Service ending with the Nicene Creed a surplice was to be worn, and nothing was said as to changing it for the black gown when the clergyman went into the pulpit to preach, to do so was illegal, as also to take off the black gown and resume the surplice if and when the Sacrament of the Lord's Supper happened to be afterwards administered.

It is erroneous to describe preaching a sermon as part of ministering the Sacrament of the Lord's Supper. If it is, then every one of the congregation, confirmed or unconfirmed, who attends evening service or any other service in which no part of the Communion Service is read, if he remains for the sermon, takes part in the ministration of the Sacrament of the Lord's Supper, which, with all respect to Mr. Dibdin's argument, appears to me to be absurd.

It was then said that the 23rd Article of Religion, under the heading of "Ministering in the Congregation," joins the office of public preaching and ministering the Sacraments together; but I fail to see that the Article shews that public preaching forms any part of the ministering of the Sacraments. The Article only deals with who may preach and who may minister the Sacraments—that is, requires that the clergyman who does the one or the other must be lawfully called and sent to execute the same. No authority has been cited, nor do I believe any can be, to shew that preaching is part of ministering the Sacrament of the Lord's Supper, and, in my judgment, it is not. Neither can preaching be regarded as one of the "other rites of the Church," which are the words in the Advertisements of Queen Elizabeth and in Canon 58 of 1603–4. What the exact meaning of the word "rite" is has not been decided;

(1) 2 P. D. 276.

but the usage of 300 years is enough to shew that, whatever the word means, preaching in a black gown, which seems to have been the ordinary clerical dress, cannot be an infringement of the regulations requiring the use of the surplice in "ministering the Sacraments and other rites of the Church."

The passage in the judgment of the Privy Council in *Hebbert* v. *Purchas* (1), to the effect that a minister's proper vestment is a surplice, has no reference to preaching, but only to Sacraments and other solemn religious services with which alone the Court was concerned. The absence in the Rubric of anything directing a change of vestment between the ante-Communion Service and the Administration of the Lord's Supper merely shews that to preach in a surplice is not unlawful, not that to preach in a black gown is unlawful. Moreover, how does this argument apply to sermons after evening service when there is no Communion?

There is a passage in the judgment of Sir Robert Phillimore in *Elphinstone* v. *Purchas* (2), decided in 1870, in which the learned judge, when dealing with what effect an admitted disuse of certain ornaments for many centuries should have when considering whether the ornament is lawful or not, says: "In truth, however, the argument is bad from the vice of proving a great deal too much; the same argument would make the copes in cathedrals unlawful, which, it is admitted, they are not; the use of the surplice in preaching unlawful, which is the proper dress; and è converso would establish the legality of the use of the black gown, which has no warrant of law." This is the only passage which Mr. Dibdin with all his research has been able to produce relative to the alleged illegality of the black gown. In the first place, it is but the dictum of the learned judge; he had no point as to the legality or illegality of the black gown in the pulpit before him. Secondly, the view taken by the learned judge in *Elphinstone* v. *Purchas* (2), both as regards usage and the effect of the Advertisements, was dissented from by the Privy Council both on appeal from his decision in *Hebbert* v. *Purchas* (1) and afterwards in *Ridsdale* v. *Clifton*. (3) In both of these cases great importance was

(1) L. R. 3 P. C. 645. (2) L. R. 3 A. & E. 91. (3) 2 P. D. 276.

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attached to long usage. In the third place, where is the illegality of wearing the black gown to be found—the learned judge says that it "has no warrant of law"—for this dictum was delivered seven years before the judgment in *Ridsdale* v. *Clifton* (1), now relied upon for the establishment of its illegality? The "warrant of law" for the black gown is constant user for centuries. Inasmuch as no positive law exists, and no objection against the legality of the use of the black gown in the pulpit, which has ranged over 300 years, can be found, and there is no decision that its use is illegal, I agree with what I understand North J. to have held—that its use is not illegal, and, consequently, the appeal must be dismissed with costs.

The application before us does not raise the question whether a scheme can properly be sanctioned by the Court dispensing with the performance of the condition of preaching in a black gown, or of any other of the conditions imposed by the testatrix. The Court, therefore, expresses no opinion upon the point.

The Lord Chief Justice of England and Lindley L.J. agree in this judgment.

Solicitors: *West, King, Adams & Co., for Preston & Francis, Bournemouth; Bridgman & Willcocks.*

(1) 2 P. D. 276.

G. I. F. C.

CHITTY J.
1896
Nov. 26.

In re MEYRICK. MEYRICK *v.* HARGREAVES.

[1896 M. 1322.]

Revenue—Estate Duty—Settlement—Appropriated Funds—Residue—Debt on Incumbrance—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*a*); *s.* 6, *sub-s.* 2; *s.* 7, *sub-s.* 1; *s.* 8, *sub-ss.* 3, 4; *s.* 9, *sub-ss.* 1, 4, 5; *s.* 14, *sub-s.* 1.

By a post-nuptial settlement personal property was settled in the events that happened upon trust for the settlor for life, and after his death upon trust that the trustees should appropriate funds of a specified value to be held upon the trusts thereinafter declared for the benefit of two of the settlor's daughters and their issue, and should stand possessed of the residue of the trust premises in trust for the settlor, his executors, administrators, and assigns:—

Held, that the appropriated funds were not voluntary incumbrances within s. 7, sub-s. 1, of the Finance Act, 1894, upon property passing to the executor as such of the deceased (in which case the estate duty on the entire funds would have had to be borne exclusively by the settlor's residuary legatee), but that the provisions contained in the settlement with regard to those funds amounted to substantive settlements thereof, and that the estate duty was payable rateably out of the appropriated funds and the residue according to their respective values.

At the date of the indenture of April 4, 1881, hereinafter referred to, Sir G. Meyrick had by his wife, Dame Fanny Meyrick, four children, namely, the plaintiff, Emma Spencer, the wife of Gerald Robert Spencer, Clara Nugent, the wife of Algernon Nugent, then Clara Meyrick, and Fanny Douglas, the wife of Francis Douglas, then Fanny Meyrick.

By an indenture dated August 17, 1878, being a settlement executed on the marriage of the said Gerald Robert Spencer and Emma his wife, of which the plaintiff and the defendants Hargreaves and Dillon were trustees, certain trusts were declared of and concerning a sum of 17,833*l.* 6*s.* 8*d.*, which had been paid to the plaintiff and the said defendants.

By the said indenture of April 4, 1881, made between Sir G. Meyrick of the one part and Dame Fanny Meyrick of the other part, after reciting that the several securities, the particulars

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whereof were specified in the 1st schedule thereto, belonging to the said Sir G. Meyrick had been transferred into the name of the said Dame Fanny Meyrick upon the trusts thereinafter contained concerning the same Sir G. Meyrick, assigned, inter alia, first, the sum of 20,942*l.* 8*s.* 4*d.* 3*l.* per cent. annuities, the trusts whereof were declared by a certain indenture of January 5, 1879, such trusts being trusts, subject to a legacy of 8100*l.*, for Sir G. Meyrick absolutely, and, secondly, certain policies of assurance on his life, the particulars whereof were specified in the 2nd schedule, to the said Dame Fanny Meyrick, her executors, administrators, and assigns, upon the trusts thereinafter declared, subject as to the said bank annuities to the payments thereout therein mentioned; and it was declared that the trustee should pay the annual income of the securities specified in the 1st schedule, and of the said sum of 20,942*l.* 8*s.* 4*d.* bank annuities, or such part thereof as might in the event become transferable, as and when the same should fall into possession to the said Sir G. Meyrick for his life; and after his death the trustee should receive all the moneys to become payable under the policies thereby assigned, and thereout raise the sum of 2000*l.* and pay the same clear of all deductions except succession duty to the trustees of the said indenture of August 17, 1878, to be held by them upon the trusts thereby declared of the sum of 17,833*l.* 6*s.* 8*d.* thereby settled; and it was also declared that after the death of Sir G. Meyrick the trustees or trustee should stand possessed of the residue of the moneys to be received in respect of the said policies upon trust, to invest and to pay the income thereof and of the securities in the 1st schedule and of the bank annuities to Dame Fanny Meyrick for her life, subject and without prejudice to the appropriations thereinafter directed; and it was thereby declared that from and after the occurrence of whichever of the three events thereinafter mentioned should first happen, namely, first, the death of Sir G. Meyrick, if the said Clara Meyrick should have married in his lifetime; second, the marriage of the said Clara Meyrick after the death of the said Sir G. Meyrick; third, the death of the survivor of the said Sir G. Meyrick, and the said Dame Fanny Meyrick, the trustees or trustee

should appropriate a part of the trust premises, amounting at the time of appropriation to the value of 27,000*l.*, thereinafter called the first trust fund, and should after the occurrence of whichever of the same three events should first happen (with the exception that the name of Fanny Meyrick was inserted in the place of Clara Meyrick), appropriate another part of the said trust premises, amounting in value at the time of appropriation to the like sum of 27,000*l.*, thereinafter called the second trust fund, and should stand possessed of the residue of the trust premises upon such trusts as Dame Fanny Meyrick should appoint as therein mentioned; and, in default of and subject to any such appointment, the trustees or trustee should stand possessed of the residue of the trust premises in trust for Sir G. Meyrick, his executors, administrators and assigns; and it was thereby also declared that the trustees or trustee should stand possessed of the first trust fund and the income thereof upon such trusts as the said Sir G. Meyrick should, or as the said Dame Fanny Meyrick should, after his decease, in contemplation of the marriage of the said Clara Nugent, then Clara Meyrick, appoint for the benefit of the said Clara Meyrick, her husband and children or remoter issue, as therein mentioned, and in default of appointment as therein mentioned; and should stand possessed of the second trust funds upon similar trusts for the benefit of the said Fanny Douglas, then Fanny Meyrick, her husband and children. And the said indenture contained a power of revocation by Sir G. Meyrick, deceased, either wholly or partially, of the trusts thereby declared of the premises thereby assigned and the income thereof, and to declare new trusts for the benefit of himself, his executors, administrators, or assigns, or any other person or persons as he might think fit.

In exercise of such power of revocation and new appointment Sir George Meyrick on divers occasions appointed parts of the said trust premises in favour of himself, and released other parts from the power of revocation, and by deed-poll dated February 12, 1891, he declared that the trustees of the indenture of April 4, 1881, should immediately after his death raise 2000*l.* out of the funds representing the stocks, funds, and

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securities contained in the 1st schedule to the said indenture, and pay the same to the defendant Mary Julia Fulford; and by a deed-poll dated November 11, 1891, he declared that 2572*l.* 13*s.* should be raised, and the amount directed to be raised as the first trust fund should be diminished by that amount, and thereby the first trust fund became reduced to 24,427*l.* 7*s.*

By deed-poll dated September 1, 1891, being an appointment made on the marriage of the said Fanny Douglas, Sir G. Meyrick irrevocably appointed that from and after his death, if the marriage should take place in his lifetime, which event happened, the trustees of the indenture of April 4, 1881, should hold the second trust fund in trust for Fanny Douglas absolutely; and by a further deed-poll Sir G. Meyrick appointed to the defendant Emma Spencer out of the residue of the trust premises a further sum of 3000*l.* in addition to the sum of 2000*l.* held in trust for the trustees of the settlement made on her marriage for her separate use, and released his power of reversion.

On the marriage of Clara Nugent in 1875, Sir G. Meyrick confirmed the trust for appropriation and released his power of reversion.

Dame Fanny Meyrick died in 1892, having by her will, dated in 1884, appointed her husband Sir George Meyrick and the plaintiff her executors and trustees.

Sir G. Meyrick died in March, 1896, having by his will, dated in 1881, bequeathed his residuary personal estate to the plaintiff, and appointed his wife and the plaintiff his executors.

The plaintiff was one of the trustees of the marriage settlements of his three sisters, as well as trustee of the settlement of April 4, 1881, and executor of his father.

At the death of Sir G. Meyrick the total value of the trust funds held on the trusts of the settlement of April 4, 1881, was 80,000*l.* or thereabouts, and the plaintiff, as executor of his father, paid in respect of the estate duty on the said funds the sum of 6054*l.* 13*s.* 6*d.*

This summons was taken out by the plaintiff for the determination of the question whether the estate duty ought to be paid entirely out of the residue of the trust funds after payment

of the several sums payable thereout, or ought to be divided rateably between the sums of 2000*l.* payable to the trustees of the marriage settlement of Emma Spencer, the 24,427*l.* 7*s.* payable to the trustees of the marriage settlement of Clara Nugent, the sum of 27,000*l.* payable to the trustees of the marriage settlement of Fanny Douglas, the sum of 2000*l.* payable to Mary Julia Fulford, the sum of 3000*l.* payable to Emma Spencer, and the residue payable to the plaintiff.

Byrne, Q.C., and *Jason Smith*, for the plaintiff. The difficulty arises from the fact that the plaintiff is trustee of the settlement of April 4, 1881, as well as trustee of the marriage settlements of his three sisters, and also executor of his father. We submit that it is clear from a careful perusal of the sections of the Finance Act, 1894, and particularly s. 6 sub-s. 2, s. 8 sub-ss. 3 and 4, s. 9 sub-ss. 1, 4, 5, and s. 14 sub-s. 1 (1) that the plaintiff is accountable for duty as trustee of the settlement,

(1) Sect. 2, sub-s. 1 (*a*): "Property of which the deceased was at the time of his death competent to dispose."

Sect. 6, sub-s. 2: "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

Sect. 7, sub-s. 1: "In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made (*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth. . . ."

Sect. 8, sub-s. 3: "The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received."

Sect. 8, sub-s. 4: "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the

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and that the fund did not come to his hands as "executor as such." He is, therefore, entitled before paying over the several funds to deduct the rateable proportion of the duty payable in respect of each with the exception of the 2000*l.* payable to the trustees of Mrs. Spencer's settlement.

[They referred to *In re Countess of Orford.* (1)]

Farwell, Q.C., and *Austen-Cartmell*, for the trustees of Mrs. Nugent's marriage settlement. The true effect of the provisions of the settlement of April 4, 1881, and the subsequent dispositions, was that Sir G. Meyrick voluntarily created charges or incumbrances upon funds which upon his death passed to his executor as such. *In re Countess of Orford* (1) shews that the dispositions subsequent to the settlement of April 4, 1881, whereby the sums in question became payable at Sir G. Meyrick's death, amounted to charges or incumbrances upon

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extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property. . . ."

Sect. 9, sub-s. 1: "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

Sect. 9, sub-s. 4: "If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property. . . ."

Sect. 9, sub-s. 5: "A person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof."

Sect. 14, sub-s. 1: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being anthorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary."

(1) [1896] 1 Ch. 257.

the fund as a whole, and that being so no deduction can be made therefrom in respect of such sums for the purposes of estate duty (s. 7, sub-s. 1). Sect. 9, sub-ss. 4 and 5, and s. 14, sub-s. 1, do not apply to the case of property passing to the executor as such, and the residue must bear the whole duty: *In re Gray*. (1) Again, there is a clear intention in the settlement that Mrs. Nugent's and Mrs. Douglas' funds should be clear of duty. It is inaccurate to say a sum of 27,000*l*. is appropriated if in point of fact that sum is diminished by the deduction of duty and a less sum is retained to answer the appropriation. For these reasons we submit that the residue to which the plaintiff is entitled must bear the whole of the estate duty.

Farwell, Q.C., and *F. L. Wright*, for the trustees of Mrs. Douglas' marriage settlement.

Byrne, Q.C., in reply.

CHITTY J. The late Sir George Meyrick executed in 1881 a settlement. His death took place in 1896. Speaking of the property comprised in the settlement in round numbers, it was 80,000*l*. He reserved to himself a power of revocation, which he from time to time exercised and to a certain extent also released. At the time of his death the power of revocation had been altogether extinguished and was at an end. There are two settlements to be found in this document, of sums of 27,000*l*. each, in favour of two of his daughters. One sum, however, was reduced under the power to which I have referred to a sum of 24,427*l*. The Commissioners of Inland Revenue have received from Sir George's executor the estate duty upon the property which Sir George himself was competent to dispose of, and also upon this settled fund of 80,000*l*. The settlement, however, did not bind in favour of other persons the whole of the 80,000*l*., but, again speaking in round numbers, there was a sum of about 20,000*l*. which Sir George was competent to dispose of at the time of his death.

The question raised by the executor of Sir George is that he is entitled to receive from the persons interested under the settlements of that 27,000*l*. and 24,000*l*. odd, and also from

(1) [1896] 1 Ch. 620.

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others (there are subsidiary points which I will mention presently; I deal only now with those two sums) a rateable proportion of what he has paid.

It is important at the outset, having regard to the arguments I have listened to, to determine accurately what was the nature of the settlement in regard to the sums of 27,000*l.* and 24,000*l.* odd. The property comprised in the settlement included policies which would be payable on the death of Sir George, and would be payable, of course, in money; and it comprised divers other stocks and securities which are mentioned. The declaration is this: that after the occurrence of whichever of three events mentioned first happens—that is to say, the death of Sir George, if a daughter shall be married, and married in his lifetime; secondly, the marriage of that daughter after his death; and thirdly, the death of the survivor of Sir George and his wife (I stay here to mention that his wife is the sole trustee in this settlement, and that the event which did happen, in which this became binding, was the death of Sir George himself, who survived his wife)—then the trustee or trustees of the settlement are to appropriate a part of the trust premises amounting at the time of appropriation to the value of 27,000*l.*, called the first trust fund, and to hold the trust fund on the trusts which are presently declared—that is, a settlement in favour of one of the daughters; and the other is in substantially similar terms. Now I am told that by virtue of this clause and the subsequent trusts there is a clear charge of 27,000*l.* upon the general trust fund. In my opinion, that is not a correct description of this portion of the deed. Had the deed stated, as it might have done, an appropriation on the face of it of 27,000*l.*, part of the investments, to answer this settlement, it would have been a complete substantive settlement at the time. That was very properly admitted by counsel. But it is said to be a charge or incumbrance upon the whole property, because the appropriation was not to be made till after the death of Sir George. It was the duty of the trustee of the settlement to make the appropriation; and I am unable to find any distinction between this actual case and the supposed case of there being a schedule to the deed itself, shewing what trust funds were settled to

answer the 27,000*l.* To my mind it is just the same. The appropriation had to be made on the death of Sir George by the trustees for the time being. It was not a charge on any part of the trust estate in the proper sense of the term, nor an incumbrance. The trustee was to make the appropriation out of the property comprised in the settlement.

I hold, therefore, that this is not a charge or incumbrance, but in the event it was a substantive settlement. Consequently it does not fall within the 7th section of the Act, though it was a voluntary instrument at the time it was made.

In regard to the surplus of the fund, or what is termed the residue, that was property that Sir George was competent to dispose of at the time of his death, and which he has disposed of by appointing an executor and otherwise by his will. Of course his estate will have to bear the rateable proportion of the estate duty attributable to the 20,000*l.*, or whatever the exact sum may be. There was some question raised whether this was property passing on the death of the deceased. Well, of course it was; I have not mentioned it before, but it has been in my mind: the whole of the property comprised in the settlement—that is to say, the settlement of the 80,000*l.*—was subject to the life interest of Sir George which determined at his death; and without going into any particular parts of the Finance Act, which I think it is quite unnecessary to do, it was plain that this was property passing on the death of Sir George. No question is raised as to the whole of the 80,000*l.* being liable for duty.

Perhaps it is right in deference to the argument just to travel very shortly through some of the leading sections bearing on this point. Sect. 6, sub-s. 2, says: [His Lordship read the sub-section.]

Sir George's executor, the present plaintiff, was executor of his mother and also trustee of the settlement; but this section in the earlier part of it relates to the plaintiff in his character of executor of Sir George. It was argued that by virtue of the testamentary disposition of the deceased the whole of this 80,000*l.* was under the control of the plaintiff as executor of Sir George. That, in my opinion, is an argument which cannot be sustained.

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It was under his control as trustee of the settlement; for, being executor of the mother, he had accepted the trusts, as he was entitled to do, of the settlement. The sub-section provides that in the case of property not under his control, which plainly means under his control as executor of the deceased person, he may pay the estate duty, "If the persons accountable for the duty in respect thereof request him to make such payment." As trustee he was one of those persons, and he did pay the duty. I need hardly say that he paid the duty on the whole rightly; and as for the request, it was the request which he impliedly made to himself in the character of trustee to himself as executor of the deceased.

Sect. 8, sub-s. 3, provides: [His Lordship read the sub-section.] The words "personal property of which the deceased was competent to dispose at his death" include the balance of the 80,000*l.*, that is, the 20,000*l.* [His Lordship read sub-s. 4 of the same clause.] In my opinion, the earlier part of that sub-section applies to the 60,000*l.*, part of the 80,000*l.*—he was not accountable as executor for the estate duty in respect of that property; but he was accountable in his character of trustee of the settlement for at least the 60,000*l.*, if not for the whole 80,000*l.* It is not necessary to say anything more about the 20,000*l.*, because there is no question between the parties about that sum. [His Lordship read sub-ss. 4 and 5 of s. 9.] These apply to the plaintiff in his character of trustee of the settlement.

Sect. 14, sub-s. 1, was also referred to. [His Lordship read the sub-section.] The property which did not pass to the executor as such was the 80,000*l.*, apart from any question about the 20,000*l.*, and as executor he was authorized to pay or required to pay, and has paid, the estate duty in respect of such property, and is entitled to recover the rateable part of such duty from the persons entitled to the sums charged on such property. Those are the main sections relied upon. There is one I have to mention, which was relied upon by the defendants, that is s. 7, sub-s. 1, particularly the part under letter (*a*): "In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral

expenses and for debts and incumbrances; but an allowance shall not be made"—now it was said for the defendants that the case fell within this part of the 7th section—"for debts incurred by the deceased"—there was no debt here by the deceased—"or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth." I need not read the rest; I have disposed of the argument on that point by the earlier part of this judgment, in which I have held that on the facts, and on the true effect of the settlement, the sums of 27,000*l.* and 24,400*l.* were not charges and were not incumbrances, but were actual substantive settlements, in the events which happened, of securities or investments equivalent in money to the two sums I have mentioned. That disposes of the case except that there are some two or three subordinate points. Mr. Byrne admits in regard to one being the 2000*l.* directed to be raised and paid to the trustees of the settlement of August 17, 1878, that there are words in the settlement itself which shew that the sum is to be a free sum, and to be exempt from any such charge as the Legislature might by any subsequent Act of Parliament think fit to impose. With regard to other smaller sums no counsel has appeared to argue the point. They seem entirely to stand on the same footing as the two larger sums of 27,000*l.* and 24,400*l.* odd. My answer to the question will be the same as with reference to the 27,000*l.* and 24,000*l.* odd. Counsel for the defendants argued that on reading the settlement I should find the intention on the part of the settlor that the 27,000*l.* and 24,400*l.* odd were given in priority, and given in such a manner as to be exempt from the incidence of this tax. I need hardly observe that the settlor had no prophetic spirit. He did not foresee the passing of this Finance Act. There are no words pointing to this Act, or any such Act, and there are no words whatever that justify me in holding these sums to be exempt. The settlor did not foresee the coming into force of this great Act of Parliament; and the Act of Parliament applies for the reasons that I have mentioned to the various interests that were taken under the settlement.

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The result, therefore, is that I answer the questions in favour of the plaintiff with reference to the 27,000*l.* and 24,400*l.* odd and the other sums.

It does seem a curious thing that the rate of duty which falls upon the beneficiaries under these two settlements is higher because the deceased left a larger property. That is plainly done by the Act, and I have nothing to say to it. If the testator had died leaving nothing, the rate of duty imposed on the two daughters would have been much less; but because he left a considerable estate himself the rate is increased.

Solicitors: *Crawley, Arnold & Co.; Pemberton & Cope.*

G. M.

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[1896 W. 1384.]

Practice—Third Party Notice—Rules of Supreme Court, 1883, *Order* XVI., *r.* 48 *—Trustee—Breach of Trust—Firm of Solicitors—Surviving Partners—Indemnity.*

The defendant and A. were joint trustees of a settled fund, A. being a member of the firm of solicitors acting in the management of the trust. A. received the proceeds of sale of part of the trust funds as solicitor and misapplied them, and the moneys were lost. After the death of A. an action was commenced against the defendant as the surviving trustee claiming a declaration that he was liable to pay the plaintiff the sum so misapplied.

The defendant obtained an order under Order XVI., r. 48, for leave to serve a third party notice on the surviving partners of the firm of solicitors claiming to be indemnified against liability in the action:—

Held, on motion to discharge the order, that this was not a claim to indemnify the defendant against the plaintiff's claim in the action within Order XVI., r. 48, the right of the defendant to recover from the surviving partners a sum equal to the lost trust fund being an independent right and not one depending on the liability of the defendant in the action.

MOTION on behalf of Herbert Greenwood Teale and Benjamin Day, parties served with third party notices under Order XVI., r. 48, in pursuance of an order dated June 23, 1896, that the said order might be discharged.

This action was brought by the plaintiff against the defendant for a declaration that the defendant was liable to pay and

for payment by him to the plaintiff of one equal third part of a sum of 5000*l.* directed to be raised by a deed-poll dated August 30, 1883, under the hand of one Elizabeth Reynard, out of certain funds subject to the trusts of the will of one Thomas Mason, dated June 5, 1860, and of a certain indenture of settlement dated June 23, 1856, and made between the said Thomas Mason of the one part and trustees of the other part, together with interest thereon at 5*l.* per cent. from October 19, 1891, being the day of the death of the said Elizabeth Reynard, who was entitled to the income of the trust funds for life.

At the death of Elizabeth Reynard the trustees of the above-mentioned will and settlement were the defendant and Thomas Greenwood Teale, a solicitor of Leeds, whose firm consisted of himself, his son Herbert Greenwood Teale, and Benjamin Day.

In order to raise the one-third share of the 5000*l.* the defendant and Thomas Greenwood Teale, as trustees of the will and settlement aforesaid, sold sufficient of the stocks standing in their names to realize the amount required, and Thomas Greenwood Teale received the sum realized and placed it to his "office account" with Messrs. Williams & Co., the bankers of the firm, instead of to the trustees' account.

Thomas Greenwood Teale died in June, 1893, being at his death largely indebted to his bankers on his private account, and they claimed to be entitled to appropriate the balance on his "office account" as a set-off against the deficiency on his "private account," and a loss was thereby occasioned.

This action was commenced in May, 1896; and in June, 1896, the defendant served a third party notice on Herbert Greenwood Teale and Benjamin Day, as the surviving partners of the above firm of solicitors, claiming to be indemnified against liability in the action on the ground that the proceeds of sale of the securities were received by Thomas Greenwood Teale as a member of the firm of solicitors acting for the trustees, and applied to his own use.

Byrne, Q.C., and *Danckwerts*, in support of the motion. The liability of the third parties in this case is a distinct liability from that of the defendant; he is bound to replace the fund,

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but there is no contract either express or implied for an indemnity as between him and the third parties, and a defendant who applies under the rule must shew that he has such a claim or that he has a right thereto on some equitable principle. The defendant may have a right of action against the third parties in this case, but he has no right of contribution or indemnity against them within the meaning of the rule: *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1); *Baxter* v. *France* (2); *The Jacob Christensen* (3); *Constantine* v. *Warden.* (4)

The moneys came into the hands of Thomas Greenwood Teale as a member of the firm; but the other members of the firm cannot be held liable because they were partners with him during the period covered by these transactions, they taking no part in them and being ignorant of their nature. It is not within the implied authority of a partner so to act as to make himself a constructive trustee, and thereby subject his partners to the same liability: *Mara* v. *Browne* (5); *Robertson* v. *Armstrong.* (6)

Levett, Q.C., and *Stewart-Smith*, for the defendant. The trust moneys were received by Thomas Greenwood Teale as a member of the firm of which the third parties were members at the time; and Thomas Greenwood Teale was acting within the scope of his authority as partner in receiving the money, and the firm consequently became liable. Money paid to one member of a firm of solicitors in the course of the management of the affairs of a client of the firm is money paid to the firm, and in the event of any loss the firm is liable to make such loss good: *Earl of Dundonald* v. *Masterman.* (7)

The Partnership Act, 1890 (53 & 54 Vict. c. 39), by s. 11 provides that where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it the firm is liable to make good the loss; and by s. 12 that every partner is liable jointly and

(1) (1886) 34 Ch. D. 261.
(2) [1895] 1 Q. B. 591.
(3) [1895] P. 281.
(4) (1895) 73 L. T. (N.S.) 450.
(5) [1896] 1 Ch. 199.
(6) (1860) 28 Beav. 123.
(7) (1869) L. R. 7 Eq. 504.

severally with his co-partners for everything for which the firm while he is a partner becomes liable.

MacSwinney, for the plaintiff.

Byrne, Q.C., in reply.

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Dec. 16. CHITTY J. The claim of the defendant to bring the third parties before the Court in this action under Order XVI., r. 48, is founded on an alleged right of indemnity; there is no question of contribution. In the action it is sought to make the defendant liable for an alleged breach of trust by him and his deceased co-trustee, Thomas Greenwood Teale.

A right to indemnity may arise under an express or implied contract, or by reason of an obligation resulting from the relation of the parties. Such an obligation arises in equity from the relation of the parties where two trustees are liable for a breach of trust and one has applied the trust fund to his own use: in that case the trustee who has so misapplied the fund is liable to indemnify his co-trustee; so where a man has requested another to hold as trustee for him shares upon which there is a liability for calls or the like, the trustee is entitled to an indemnity, not merely out of the trust property, but by the cestui que trust personally. I give these two cases merely by way of illustration.

Now the right of indemnity claimed by the defendant does not arise from an express or implied contract; but if it arises at all, it is founded upon some obligation of the nature above stated.

The defendant's case is that the trust money was paid to the late Thomas Greenwood Teale, as a member of the firm of solicitors of whom the third parties are the survivors; and that the late Thomas Greenwood Teale was acting within the scope of his apparent authority as partner in receiving the money; and consequently that the firm became liable. On this head reference was made by the defendant's counsel to the 11th and 12th sections of the Partnership Act, 1890. Further, it was said that the money was traced into an account at the bank in the name of Thomas Greenwood Teale, which was in fact the firm's account, although (as has been decided in an action

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between the third parties and the bank) the bank, who had no notice of the trust, were entitled to deal with the account as the account of Thomas Greenwood Teale only. In substance the claim of the defendant is to follow the trust money into the hands of the firm who had notice of the trust, and, the money having been lost or misapplied, to charge the surviving partners with the amount. It is obvious that this is not a claim to indemnify the defendant against the plaintiff's claim in the action. The right of the defendant (if it exists) to recover from the surviving partners a sum equal to the lost trust fund is not a right depending on the liability of the defendant in the action: it is an independent right. It may be tested thus: If the plaintiff failed in the action, would the defendant's claim against the third parties be thereby defeated? It is clear that it would not. If the surviving partners are liable to the defendant he could, whether he failed or succeeded in the action, pursue his remedy against the surviving partners: as surviving trustee he could sue them for the purpose of getting in a sum of money which when received by him would form part of the trust fund in his hands. In such an action the circumstance that he was not personally liable to his cestuis que trust would constitute no defence—it would be immaterial.

For these reasons I hold that the third party notice is not within Order XVI., r. 48, and that the order must be discharged.

Solicitors: *Vincent & Vincent; Williamson, Hill & Co.; Witham, Roskell, Munster & Weld; Perkins & Weston.*

G. M.

GOLD REEFS OF WESTERN AUSTRALIA, LIMITED v. DAWSON.

NORTH J.
1896
Dec. 8, 18.

[1896 G. 1611.]

Practice—Unauthorized use of Plaintiff's Name—Motion to strike out Name—Discontinuance of Action—Jurisdiction—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 21—*Rules of the Supreme Court*, 1883, *Order* XXVI., *r.* 1; *Order* LXXII., *r.* 2.

A company named as co-plaintiffs in an action served notice of motion to strike out their name, and asked that the solicitors who had issued the writ might be ordered to pay the company's costs, on the ground that their name had been used without their authority. Before the motion could be heard the solicitors served a notice wholly discontinuing the action:—

Held, that, notwithstanding the discontinuance, the Court had jurisdiction to make the order asked for.

MOTION that the name of the above company might be struck out of the writ in the action, on the ground that the writ had been issued without the authority of the company, and that the solicitors by whom the writ was issued might be ordered to pay to the company their costs (taxed as between solicitor and client) of the action and of the motion.

The writ was issued on September 3, 1896, in the name of the company, some shareholders and two directors of the company being joined as co-plaintiffs, claiming an injunction to restrain the defendants from acting upon a special resolution passed for the voluntary winding-up of the company and appointing the defendant Dawson liquidator. Dawson had been the managing director of the company. Two other directors were made defendants. Notice of motion in accordance with the claim was served, and on October 30, 1896, North J. dismissed the motion with costs.

On November 17, 1896, notice of the motion to strike out the company's name was served, the notice being given in the name of the company, and signed by the solicitors who represented the defendants.

On November 19, 1896, the motion not having been yet heard, the solicitors who acted for the plaintiffs served on the

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defendants a formal notice that they discontinued the action wholly.

Swinfen Eady, Q.C., and *Duka*, for the applicants and for the defendants. Notwithstanding the discontinuance of the action, the Court has jurisdiction to make the order asked for. Under the old practice of the Court of Chancery, when a bill filed without authority had been dismissed with costs and the plaintiff had been attached for non-payment of the costs, the Court ordered the solicitor who had wrongly made use of the plaintiff's name to indemnify him: *Hood* v. *Phillips* (1); *Wade* v. *Stanley*. (2)

[NORTH J. referred to *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*. (3)]

In that case there was a sole plaintiff. In *Nurse* v. *Durnford* (4), in which the name of one of several co-plaintiffs had been used without authority, an order was made for payment by the solicitors of the costs of the plaintiff whose name they had used without authority, and of the defendants, and this was approved and followed in *Fricker* v. *Van Grutten*. (5) Upon discontinuance of an action the defendant can issue a fi. fa. for his costs: *Bolton* v. *Bolton*. (6) The solicitor who has used the company's name without authority cannot get rid of his liability to pay costs by serving a notice of discontinuance. The entire discontinuance of an action has no greater effect than the dismissal of a bill with costs had under the old practice of the Court of Chancery, and it does not prevent the Court from now striking out the name of the company and ordering the solicitor to pay the costs: *In re Savage*. (7) Undertakings as to damages have been enforced after the dismissal of an action.

Kenyon Parker, for the solicitors. The old practice of the Court of Chancery has no application; the question is, what is the right construction of rule 1 (8) of Order XXVI. of the Rules of

(1) (1842) 6 Beav. 176.
(2) (1820) 1 J. & W. 674.
(3) (1879) 13 Ch. D. 310.
(4) Ibid. 764.
(5) [1896] 2 Ch. 649.
(6) (1876) 3 Ch. D. 276.
(7) (1880) 15 Ch. D. 557.
(8) By rule 1, "The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt

the Supreme Court. No doubt an undertaking given to the Court by a plaintiff on obtaining an injunction can be enforced after the dismissal of the action; but that is because in such a case the plaintiff has voluntarily placed himself under the power of the Court: *Newby* v. *Harrison*. (1) Rule 1 of Order XXVI. says that after a notice to discontinue an action one thing shall happen, namely, the plaintiff shall pay the defendant's costs of the action. The discontinuance puts an end to all other proceedings in the action, except for the purpose of working out orders previously made. Under the old practice when a bill had been dismissed for want of prosecution the Court would not afterwards order the defendant to pay the costs of a motion of which he had previously given notice but had abandoned: *Farquharson* v. *Pitcher*. (2) That was because the suit was at an end for all purposes, though under the old practice a bill which had been dismissed remained on the file. The discontinuance of an action has now a greater effect than the dismissal of a bill under the old practice. In *Conybeare* v. *Lewis* (3), after notice of appeal against the refusal of an injunction had been served, the plaintiff gave notice to discontinue the action wholly, and it was held that the discontinuance had put an end to the appeal, and that it must be struck out. If the solicitors have used the company's name without authority they will be answerable in an action for damages; but the company cannot proceed in the present action, which is at an end for all purposes. This motion is entirely misconceived. At any rate, the solicitors should have an opportunity of adducing evidence that they were authorized to use the company's name.

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thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue the action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action."

(1) (1861) 3 D. F. & J. 287.

(2) (1828) 4 Russ. 510.

(3) (1880) 13 Ch. D. 469.

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NORTH J. In my opinion this motion is properly made. It is argued that the notice of discontinuance has put an end to the action and to the motion of which notice had been previously served. This is a technical objection, and I must assume that the motion is rightly made if the technical objection can be got over. Is the objection well founded? Rule 1 of Order XXVI. says that on wholly discontinuing the action the plaintiff shall pay the defendant's costs of the action; but it does not say in express terms that nothing else shall be done in the action. In my opinion the discontinuance of an action cannot have any larger effect than the dismissal of a bill with costs under the old practice. Under that practice it was well settled that after the dismissal of a bill with costs a person whose name had been used as plaintiff without authority could obtain an order to strike out his name, and that the solicitor should indemnify him against costs. This was so under the old practice, and it has not been in express terms altered by rule 1 of Order XXVI. It would be surprising if such an application as this could be evaded by the solicitor's putting an end to the action in this way. I can find nothing in the Acts or the Rules which alters the old practice in this respect. Sect. 21 of the Judicature Act of 1875 provides that, "Save as by the principal Act or this Act, or by any rules of Court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act, or with any rules of Court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed." And by Order LXXII., r. 2, "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." I

cannot find any provision in the Acts or in the Rules as to what is to be done when a solicitor has used the name of a person as plaintiff without his authority. I think, therefore, that the old practice remains in force, and that this motion is technically right. But if Mr. Kenyon Parker desires it, I will order the motion to stand over to the next motion day, so that the solicitors may have an opportunity of filing an affidavit to prove that they had authority to use the company's name. In any event they must pay the costs of to-day; and, if they do not file any affidavit, the order asked for will be made, and they must pay the company's costs as between solicitor and client.

Dec. 18. The solicitors having filed an affidavit, the motion came on again for hearing.

NORTH J. held that the solicitors had not proved that they had authority to use the company's name, and he made the order asked for, directing also that the solicitors should pay the defendants' costs as between party and party.

Solicitors: *Gover & Chiles; Wyatt Digby & Co.*

W. L. C.

In re McMURDO. PENFIELD *v.* McMURDO.

[1889 M. 1718.]

Practice—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *r.* 7—*Bill of Costs—Interest—Administration Action—"Person liable."*

The legal personal representative of a deceased client is the proper person from whom to demand payment of a bill of costs as the person liable, so as to make the costs carry interest.

In the administration by the Court of an insolvent estate, a bill of costs due from the deceased had been delivered, by direction of the chief clerk, to the solicitor of a creditor having the conduct of the cause:—

Held, that there had been no demand for payment on the person liable, and that the costs did not carry interest.

THIS was a creditor's action for the administration of the estate of the late Colonel Edward McMurdo against his

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executrix, his widow, now the wife of the plaintiff. The administration order was made on July 25, 1889. After the marriage of the plaintiff and defendant the conduct of the proceedings was given to William Williams, an admitted creditor. The estate was insolvent, and a receiver had been appointed. Messrs. Hurford & Taylor were the solicitors of the testator, and were also the solicitors of the executrix. They carried in a claim for costs in respect of which they claimed a lien on property of the testator in South Africa. The proceeds of that property, 932*l.* 4*s.*, was paid into court subject to their lien (if any). In accordance with a direction of the chief clerk, Messrs. Hurford & Taylor delivered their bill of costs by letter dated October 23, 1892, to Mr. Harston, the solicitor of William Williams and also of the receiver. On January 16, 1896, the chief clerk allowed the lien claimed by Messrs. Hurford & Taylor, and directed their bill to be taxed. On taxation the sum of 658*l.* 14*s.* 1*d.* was allowed. Messrs. Hurford & Taylor claimed to be allowed interest at 4 per cent. on their taxed costs from November 23, 1892, under rule 7 of the General Order made under the Solicitors' Remuneration Act, 1881. The judge in chambers refused their claim to interest, and a motion was now made on behalf of Messrs. Hurford & Taylor to rescind the order made by the judge in chambers, and in lieu thereof to have an order made allowing the interest claimed.

Swinfen Eady, *Q.C.*, and *Eustace Smith*, for the applicants. Rule 7 of the General Order made under the Solicitors' Remuneration Act, 1881, gives a solicitor interest on his bill of costs from one month after delivery of the bill to his client: "And in cases where the same are payable . . . . out of a fund not presently available, such demand may be made . . . . on the trustee or other person liable." It is settled that delivery of a bill of costs amounts to a demand for payment: *Blair* v. *Cordner*. (1) The person liable to pay in an administration action is the person having the conduct of the cause.

Eastwick, for William Williams. The case is not within the terms of the rule, but is to be construed according to its plain

(1) (1887) 19 Q. B. D. 516.

meaning; in no sense can the creditor having the conduct of the proceedings be said to be liable to pay a debt of the testator.

Swinfen Eady, Q.C., in reply. The Court has to look at the substance of the rule; the person having the conduct of the proceedings is the only person whose duty it is to see that the debts are paid, and he is in a sense—the sense the Court will give to the words of the rule—the person liable.

NORTH J. In this case there is a considerable estate with very large liabilities. It has turned out that the estate is insolvent, and the debts cannot be paid in full. Many claims have been carried in. Messrs. Hurford & Taylor carried in a claim for solicitors' costs; they claimed a lien which has been allowed, and the bill of costs has been taxed. They are now asking to be allowed interest on the taxed amount from November 22, 1892. In respect to interest they are no better off than other creditors who have no special contract, apart from the special rule under which they claim; they have no contract as to interest, and the only way they can get interest is by the application of rule 7 of the General Order made under the Solicitors' Remuneration Act. As to that, they are not persons deserving special favour; on the other hand, they are entitled to receive what the law gives them, even if it is more than other creditors get; and I must construe the rule fairly between the parties, leaning in favour of neither. It seems to me, the question rests entirely on the construction of the rule; and unless on a fair construction of the rule the case comes within it there is no reason why the applicants should be allowed interest. The first sentence of the rule does not apply to this case. Then the rule provides: "A solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client." And it is quite settled that a delivery of a bill of costs amounts to a demand for payment. Then the rule proceeds: "And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable." The person

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who was originally liable in this case was the testator. No demand can, of course, be made on him, as he is dead. But in the case of a testator who has assets the person liable is the executor; and it seems to me that in the case of a testator whose assets are deficient, though there is an administration action, upon the fair construction of the rule the person liable is still the executor. If it is not the executor, I do not see who the person liable can be. In my opinion, therefore, in this case the executrix was the person liable; and if the demand had been made on her, interest from one month after demand would have been payable; but the bill of costs was not delivered to her.

The claim was made some years ago. Of course, it was necessary, before the claim could be allowed, that the bill of costs should be taxed; and for that purpose the chief clerk gave directions that the bill should be delivered to the solicitor of the person having the conduct of the cause. It turned out that the taxation was delayed for a long time. At the time the bill was delivered the question of interest was not in the mind of the parties. If the solicitors had thought that there would be all this delay they might have asked that the delivery should not be to the person having the conduct of the cause, but have said, "As that would be a delivery to a person not liable, allow us to deliver it to the executrix"; which would have been done as a matter of course. For some reason, when the bill was delivered the taxation was deferred and did not take place till recently, and interest is now asked from November 23, 1892. The question is whether the facts bring the case within the latter part of rule 7. In my opinion they do not: and, under the circumstances, I do not think the applicants entitled to interest. I must dismiss the motion with costs.

Solicitors for applicants: *Hurford & Taylor.*
Solicitor for respondent: *Harston.*

D. P.

WINKLE *v.* BAILEY.

NORTH J.

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Dec. 8, 9, 10.

[1896 W. 3553.]

Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 299—*Receiver in Lunacy—Pauper Lunatic—Guardians.*

Where a receiver in Lunacy of funds of a lunatic in a pauper asylum had been appointed, an injunction was granted to restrain the guardians from levying a distress against trustees of the fund to enforce a magisterial order for payment of the fund to the guardians.

Sub-s. 2 of s. 299 of the Lunacy Act, 1890, operates only as a discharge to trustees of a lunatic's property; and *In re Newbegin's Estate*, (1887) 36 Ch. D. 477, is not an authority that a magistrate's order under sub-s. 1 in respect of property in the hands of the trustees cannot be enforced.

Miss Clara Winkle, on the application of her sister, Mrs. Preem, was admitted to the Chorlton Union Workhouse, Withington, on August 15, 1896. She was certified by the medical officer of the union to be of unsound mind, and on August 17, 1896, she was admitted to the County Lunatic Asylum, Lancaster. The guardians thereupon became liable to pay a sum of 8*s.* 9*d.* a week in respect of her maintenance. Miss Winkle had some property, as mentioned below, and most of the expense of the guardians in relation to her maintenance had been paid by Mrs. Preem, who had also promised to pay their future expenses. Miss Winkle's property consisted of 60*l.* in the savings bank and a sum of 165*l.* in the hands of Joseph Bailey and R. Twemlow, trustees of a family settlement, which sum, on September 12, had been reduced to 125*l.* 9*s.* 11*d.*, at which date the guardians of Chorlton Union had been paid all their expenses except 2*l.* 2*s.* 11*d.*

On October 30 a summons, returnable for November 13, was taken out by Mrs. Preem for the appointment of a receiver of Miss Winkle's property.

On November 6 the guardians took out a summons before the Manchester magistrates, under s. 299 of the Lunacy Act, 1890 (1), for an order on Messrs. Bailey and Twemlow directing

(1) Sect. 299 of the Lunacy Act, 1890, is: "(1.) If it appears to any justice that a lunatic, chargeable to any union, or local authority, has any

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William M'Clelland, their relieving officer, to seize 165*l.*, property of the lunatic in their hands. On November 10 the guardians' solicitor was informed by letter of the pendency of a summons for the appointment in Lunacy of a receiver of Miss Winkle's property.

On November 11 the magistrates made an order (the application being opposed by Mrs. Preem and the trustees) that William M'Clelland should seize the 125*l.* 9*s.* 11*d.* then in the hands of Bailey and Twemlow, the trustees for Miss Winkle, and apply the same towards the expenses already incurred and to be incurred by the guardians.

On November 13 an order was made in Lunacy appointing the official solicitor receiver of the property of Miss Winkle, and directing him to pay out of such property the 2*l.* 2*s.* 11*d.* then due to the guardians, and any further expenses they might incur for maintaining her.

On November 18 a summons was taken out by the guardians for a distress warrant to enable the officer of the guardians to levy the 125*l.* 9*s.* 11*d.* and costs on the goods of Messrs. Bailey and Twemlow; but the magistrates directed that the application should stand over until this motion was disposed of.

An action in the High Court was commenced by Miss Winkle, suing by the official solicitor as next friend, against the trustees Bailey and Twemlow and the guardians of Chorlton Union, claiming (1.) an injunction to restrain the guardians from

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real or personal property more than sufficient to maintain his family, if any, such justice may by order direct a relieving officer of the union, or the treasurer or some other officer of the local authority, to seize so much of any money, and to seize and sell so much of any other personal property of the lunatic, and to receive so much of the rents of any land of the lunatic as the justice may think sufficient to pay the expenses of maintenance and incidental expenses respectively incurred or to be incurred in relation to the lunatic. (2.) If any trustee, or the bank, or any other society or person having possession of any property of a lunatic, shall pay or deliver to a relieving officer of a union, or to the treasurer or other officer of the local authority to which respectively a lunatic is chargeable, any money or other property of the lunatic, to repay the charges in this section mentioned, whether pursuant to an order under this section, or without an order, the receipt of such relieving officer, treasurer, or officer shall be a good discharge."

proceeding to enforce distress; and (2.) an order on the trustees to pay to the receiver the fund in their hands to be dealt with as directed by the Master in Lunacy; and (3.) that the guardians might be ordered to pay costs.

An interim ex parte injunction had been granted against the guardians in terms of the writ. A motion was now made on behalf of the plaintiff to continue the injunction till trial. The motion was treated at the request of all parties as the trial.

In a joint affidavit made by officers of the defendant guardians it was said: "In taking the proceedings in this case before a court of summary jurisdiction the defendant guardians were pursuing their regular practice in such cases, as being the most expeditious and economical way of dealing with the property of pauper lunatics and applying it to their past and future maintenance, and holding any unspent balance for payment over to the patient on recovery, or to the persons entitled thereto in case of the patient's death. There are upwards of 900 lunatics chargeable to and maintained by the defendant guardians at a cost of 21,000*l.* and upwards per annum, and it is highly important that all the available property of pauper lunatics should be applied in or towards their maintenance with the least possible expenditure in the way of law costs, and the defendant guardians have always considered that s. 299 of the Lunacy Act, 1890, and the corresponding statutory provisions of the Acts preceding the Lunacy Act, 1890, were expressly intended to obviate any necessity for the dilatory and incomparably more costly process of the application for the appointment of a receiver in Lunacy, and that the Legislature had deemed boards of guardians to be public bodies of sufficient importance and responsibility and organization to be competent to deal in a fit and proper manner in such cases. The defendant guardians have always considered that such an order of justices as that made on November 11, 1896, invested the said guardians with power to act as the legally constituted representatives of the pauper lunatic concerned, and rendered the appointment of a receiver in Lunacy unnecessary and improper, but they were always prepared to account to the Commissioners in Lunacy, or other proper authority, or to the lunatic on recovery, or her

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legal personal representatives in case of her death, for all moneys or other property which might come to the hands of the defendant guardians in pursuance of the said order or otherwise, and they duly notified to the chief clerk to the Masters in Lunacy the application which was being made for the said order."

It was also stated that the guardians were desirous of obtaining an expression of the opinion of the Court for future guidance. There was evidence in reply to the effect that it was intended to remove the lunatic from the county asylum and place her where she would get additional comforts.

Swinfen Eady, Q.C., and *Method*, for the plaintiff. The jurisdiction of the Lord Chancellor in Lunacy is not affected by s. 299 of the Lunacy Act, 1890. The object of the section is to enable the guardians in a proper case to get payment of expenses, and not to constitute them an uncontrolled committee of the estate of a lunatic. The right of the guardians to be paid out of the property of the lunatic does not make them the proper persons to administer the whole estate of the lunatic: *In re Bell.* (1) In this case the expenses of the guardians were guaranteed, and it was improper for them when they had notice of the proceedings in Lunacy to intermeddle with the lunatic's property. The Court will therefore exercise its jurisdiction to control the use or attempted use of the process of another court to interfere with the action of the receiver.

Macmorran, Q.C., and *Brinton*, for the defendant guardians. The object of s. 299 of the Lunacy Act, 1890, is to substitute a cheap and direct mode of getting at the property of a pauper lunatic. Supposing the distress to be enforceable, we contend that, as the guardians had obtained an order to seize the lunatic's property previously to the appointment of a receiver, and they are the best persons to administer a small property, being a responsible body, accountable to the receiver and to any representatives of the lunatic, the Court will not interfere with their management: *Kerr* v. *Corporation of Preston* (2): *In re Farnham* (3); *Brockwell* v. *Bullock* (4); *In re Winkle.* (5)

(1) [1896] 1 Ch. 1.
(2) (1876) 6 Ch. D. 463.
(3) [1896] 1 Ch. 836.
(4) (1889) 22 Q. B. D. 567, 573.
(5) [1894] 2 Ch. 519.

But sub-s. 2 of s. 299 shews that proceedings under the section against trustees to get possession of property in the hands of trustees are permissive only, and cannot be enforced without their consent against the trustees: *In re Newbegin's Estate.* (1) The distress warrant is therefore inoperative, and the Court will not grant an unnecessary injunction to restrain futile proceedings.

Upjohn, for the trustees.

Swinfen Eady, Q.C., in reply. Sub-s. 2 of s. 299 of the Lunacy Act, 1890, merely protects the trustees by giving them a discharge; it does not qualify the first part of the section. Supposing, however, that the distress warrant was illegally granted, that fact is no reason why an injunction should not be granted.

1896. Dec. 10. NORTH J., after stating the facts, continued:— The view taken by the guardians was that they were possessed of statutory authority co-ordinate with the jurisdiction of the Lord Chancellor in Lunacy over the property of a lunatic, so far as related to a pauper lunatic. They said that if they could seize the lunatic's property they were the statutory authority to deal with it, and no one else had jurisdiction over it; and that after the magistrate's order of November 11 it was improper for the Lord Chancellor to interfere. They also said that they desired to get some guidance from the Court for their future conduct. I am sorry I cannot give them any assistance in that respect: I must deal with the case before me. In my opinion the guardians acted most improperly, when they knew that a receiver had been appointed, and at the same time had been directed to pay to them out of the lunatic's property every expense they had incurred, or could incur, before the lunatic was removed from the county asylum. It was said that they had statutory authority, and that, as they had a legal right to the lunatic's property, the receiver who was appointed after the magistrate's order had no right to interfere. One case cited in support of their view seems to me very much against them, *In re Winkle* (2); for there it was held that

(1) 36 Ch. D. 477. (2) [1894] 2 Ch. 519.

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where a receiver of the property of a lunatic had been appointed such property could not be seized under a writ of fi. fa. by a judgment creditor, and that the Court would order the property to be brought into court, and payment thereout of costs and maintenance of the lunatic in priority to the creditor's claim, but subject to costs and maintenance without prejudice to any charge or priority of the creditor. That decision is adverse to the contention of the guardians.

With respect to this application for a distress warrant, Mr. Macmorran says there was a mistake: he says that the guardians had no power to obtain it, and it could not properly be granted, and that it could not be enforced, and therefore there is no reason for coming here. When I look at s. 299 of the Lunacy Act, 1890, the 1st sub-section in terms gives power to a justice to direct the officer of a union to seize and sell so much of the personal property, and receive so much of the rents of the land of a lunatic chargeable to the union, as the justices may think sufficient to pay expenses incurred and to be incurred by the union. [His Lordship then read the 2nd sub-section, and proceeded:—]

Mr. Macmorran says that the attempt to obtain a distress warrant was wrong because of the 2nd sub-section, inasmuch as it was decided by Chitty J. in *In re Newbegin's Estate* (1) to be merely permissive, and that there could not therefore be any proceedings against the trustees; and that the order was not binding on them unless with their permission, and they wished to pay the money in their hands over. See what the result of that would be! The sub-section applies not only to the case of property of a lunatic in the hands of a trustee, but to the case of the bank, or any other society or person having possession of any property of a lunatic. If that be the true meaning of the sub-section, the 1st sub-section could scarcely have any application: it could only apply to any property that might lie loose without being in the possession of any one. That is absurd. I think the true meaning of the 2nd sub-section is quite clear (the earlier Act on which the case cited was decided was in different language; Chitty J. said that the language there used was permissive). I think that the 2nd sub-section

(1) 36 Ch. D. 477.

here is also permissive; it permits a trustee to pay over money on a magistrate's order or without an order, and then the receipt of the officer to whom it is paid is a good discharge. It is clear that this is not intended to relieve a trustee from the operation of the first part of the section; but, to avoid expense and delay, it enables him safely to pay to the officer of the guardians before a magistrate's order; or after such an order, but before proceedings to enforce it. If the trustee will not pay without compulsion, there is power for the relieving officer to enforce payment under the 1st sub-section.

Then it is said that this action was unnecessary. I do not see why. The receiver wished to get in, as he was bound to do, the estate of the lunatic. He applied to the trustees for payment. They say they cannot pay the money over because of the proceedings before the magistrates; and of course they could not safely pay it over with the threat of a distress warrant hanging over them. It was therefore necessary, to protect the trustees, to take proceedings against the trustees; and against the guardians, the persons whose conduct interfered with their payment to the receiver; and I think the action of the receiver is perfectly right.

In a great many cases, I have no doubt that the section on which the guardians rely is very useful, and proceedings under it have the advantages alleged by the guardians. But I do say that in the present case, where an order in Lunacy had been made appointing a receiver, and providing for the payment at once of every penny for which the guardians were or could become liable, it was absolutely improper for the guardians to proceed to enforce the magistrate's order by distress.

The parties have agreed that I should deal with the whole matter now. The proper order to make, in my opinion, is that the trustees should pay over the fund to the receiver; and the guardians must pay the costs of the action.

Solicitor for plaintiff: *The Official Solicitor.*

Solicitors for trustees: *Pearce & Sons.*

Solicitors for guardians: *Chester & Co., for Crofton, Craven & Worthington, Manchester.*

D. P.

STIRLING J. 1896 Nov. 28.

NELSON *v.* ANGLO-AMERICAN LAND MORTGAGE AGENCY COMPANY.

[1896 N. 1560.]

Company—Register of Mortgages—Right of Debenture-holder to take Copies—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

The right of a creditor or member of a company to inspect the register of mortgages under s. 43 of the Companies Act, 1862, includes a right to take copies of the register.

MOTION.

The plaintiff was the holder of a debenture issued by the defendants, who were a company incorporated under the Companies Acts. In 1895, the company being then in difficulties, adopted a scheme under the Joint Stock Companies Arrangement Act, 1870, for the payment of their debentures by instalments. In 1896, the plaintiff being dissatisfied with the position of the company's affairs, instructed his solicitor to look into the matter on his behalf. The solicitor accordingly attended at the company's offices for the purpose of inspecting the register of mortgages kept by the company under s. 43 of the Companies Act, 1862. Upon the register being placed before him he proceeded to make extracts from it. This was objected to by the company's officials, and the register was withdrawn from him, and he was not permitted to take copies of any portion of its contents.

The plaintiff then issued the writ in this action, and now moved for an injunction to restrain the company, its officers and servants, from refusing to allow him or his solicitor to take copies from the register.

The hearing of the motion was by consent treated as the trial of the action.

Buckley, Q.C., and *R. Younger*, for the motion. The right to inspect the register carries with it the right to take copies: *Mutter* v. *Eastern and Midlands Ry. Co.* (1) It is true that

(1) (1888) 38 Ch. D. 92.

that was a decision on the Companies Clauses Act, 1863, but the principle applies to this case. The Act of 1862 does not forbid the taking of copies, and in the absence of any prohibition the right to do so is necessarily included in the right of inspection.

Hastings, Q.C., and *Ashworth James*, for the company. *Mutter* v. *Eastern and Midlands Ry. Co.* (1) does not govern this case. That was a decision upon s. 28 of the Act of 1863, under which the addresses as well as the names of the shareholders are required to be inserted in the register with the view of enabling a person entitled to inspect the register to communicate with his fellow shareholders. Under s. 43 of the Act of 1862, however, the names only of incumbrancers and not their addresses are required to be registered. No doubt where it is intended to enable a person inspecting the register to communicate with those whose names appear upon it, it is only reasonable that the right of inspection should include the taking of copies. In the case of a section like this, the object of which is to enable persons dealing with the company to gauge the extent of its credit, there is no reason that the right of taking copies should be included in the right of inspection.

Again, in the section which was under consideration in *Mutter* v. *Eastern and Midlands Ry. Co.* (1), no penalty is imposed for refusal to allow either inspection or the taking of copies. Under the Companies Clauses Act, 1845, both inspection and taking copies are expressly permitted; and by s. 119 a penalty is imposed for the refusal of either. Under the Act of 1862 a penalty is imposed only for refusal of inspection, and not for refusal to permit the taking of copies—an omission which goes to shew that the right of taking copies was not intended to be given.

STIRLING J. The question is whether the plaintiff, who, as a debenture-holder, is admittedly entitled to inspect the register under s. 43 of the Act of 1862, is also entitled to take copies of it. The only other section of the Act which has been referred to is s. 25. That section provides for the keeping by every

(1) 38 Ch. D. 92.

STIRLING J. company of a register of its members, in which register are to be entered the names and addresses of the members of the company, and a statement of the shares held by each member. Sect. 43, which provides that every limited company shall keep a register of all mortgages and charges specifically affecting its property, does not require the addresses of the mortgagees or persons entitled to charges to be entered in the register.

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I have to consider what is the law applicable to the case under these circumstances. The law has been considered in a case arising under the Companies Clauses Act, 1863: *Mutter* v. *Eastern and Midlands Ry. Co.* (1) There it was held that the right of inspection and perusal of the register of debenture-stockholders, which by s. 28 of that Act is given to mortgagees, bondholders, debenture-stockholders, shareholders and stock-holders of the company, includes a right to take copies. That case was decided by the Court of Appeal, affirming a decision of Chitty J. The general effect of the judgments of the Court of Appeal is that a right to inspect carries with it a right to take copies, unless it can clearly be seen that the latter right was not meant to be given. The mere right of inspection without copying would afford but little assistance to a person exercising that right, inasmuch as he would have to rely upon his memory as to what the register contained. The concluding words of Lindley L.J. in the case I have mentioned are these (2): "Parliament having conferred the right to inspect, the Court ought not so to construe the statute as to render the right conferred illusory, and if the Court were to hold that in such a case as the present the right to inspect existed but the right to take copies did not, the Court would in effect be rendering the statute of no avail." That decision is no doubt upon a different statute, but it shews the general way in which the Court regards the right of inspection.

It may be, however, that there is something in the Act of 1862 which shews that the right to take copies is excluded. It is said that s. 43 does not require the addresses of the incumbrancers to be inserted in the register, and it is contended that Lindley L.J. in his judgment speaks of the object of allowing

(1) 38 Ch. D. 92. (2) 38 Ch. D. 107.

inspection being to enable a person to communicate with the other stockholders. The Lord Justice, after saying that s. 36 of the Act of 1845 would be practically useless if it were construed so as not to include a right to take copies, for a judgment creditor who is entitled to sue all the shareholders whose shares are not paid up may desire to get their names and addresses for the purpose, goes on: "Similar observations apply, though less forcibly, to s. 45 of the Act of 1845 and s. 28 of the Act of 1863. But it is obvious that a shareholder or debenture-stockholder may desire to consult the whole of the debenture-stockholders on some matter which concerns them all, and it is reasonable to suppose that the right to inspect the debenture stock register is conferred to enable him to do this as well as for other purposes." And it is said, in this case, that the Legislature cannot have had that object in view, because, if it had, it would have provided for the addresses to be registered. The question, however, is whether the absence of such a provision is enough to enable me to hold that the Legislature did not intend the right of taking copies to be included? I think not. A person inspecting the register may have other objects in view than that of communicating with those whose names are found there: he may, for example, wish to satisfy himself that it contains a faithful record of the mortgages and charges affecting the property of the company. I do not know how this company's register has been kept, but I must assume that it has been properly kept. Primâ facie, a person entitled to inspect the register is entitled to take copies of the information contained in it, and whatever his motive in taking a copy may be, such is nevertheless his right; he cannot be expected to carry all the information in his memory. But then another argument is used. It is said that the judgment of the Court of Appeal proceeded upon the ground that in the section then under consideration no penalty was imposed for refusing inspection, whereas in this section a penalty is imposed, and it is contended that if it had been intended to confer the right to take copies, a penalty would also have been imposed in the case of a refusal to allow the exercise of that right. I am unable to follow that view of the decision of the Court of Appeal. [His Lordship

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then referred to the passage of Lindley L.J.'s judgment dealing with this point, and said :—]

What the Lord Justice is dealing with there is the true construction of the Act before him, and he expressly says that the fact that both inspection and taking copies were mentioned in a section of another Act, whilst inspection only was mentioned in the Act before him, did not shew that in framing the latter a right to take copies was intended to be excluded. I do not see that the reasoning of the Lord Justice supports the argument for the defendants. On the whole, I come to the conclusion that there is nothing in the Act of 1862 to negative the primâ facie right of a person inspecting to take copies. I therefore hold that the plaintiff is entitled to take copies of the register in this case, and I grant an injunction restraining the company from interfering with him in the exercise of his right of inspection in accordance with s. 43.

Solicitors : *Henry Smith ; Dale, Newman & Hood.*

G. A. S.

STIRLING J. 1896 *Oct.* 27; *Dec.* 9.

PALMER *v.* RICH.

[1896 P. 301.]

Joint Tenancy—Severance—Effect of Marriage—Lease by Husband of one Joint Tenant and the other Joint Tenant.

The marriage of a woman having a joint estate in freeholds or leaseholds does not operate as a severance of her joint tenancy; nor does the granting of a lease by the husband and the other joint tenant, reserving the rent to the lessors jointly, necessarily effect a severance of the wife's joint tenancy.

THIS was a special case stated by consent for the opinion of the Court under Order XXXIV. upon the question whether a joint tenancy in certain freehold and leasehold property had been severed either by the marriage of one of the joint tenants or otherwise.

The statement of the case, so far as is material for the purpose of this report, was as follows :—

1. By an indenture dated January 19, 1854, and made

between Thomas Palmer of the one part and Ellen Palmer and the plaintiff, Agnes Palmer, of the other part, the said Thomas Palmer, in consideration of his natural love and affection for his daughters, the said Ellen Palmer and the plaintiff, in execution of a general power of appointment by deed given to him by a certain indenture therein recited, appointed and conveyed in fee unto Ellen Palmer and the plaintiff the freehold hereditaments therein mentioned.

Thomas Palmer died on January 21, 1857, without having revoked the voluntary conveyance made by the above-mentioned indenture.

2. By an indenture dated April 29, 1856, and made between Robert Phillips Chambers of the one part and Ellen Palmer and the plaintiff of the other part, in consideration of the sum of 500*l.* to the said R. P. Chambers, expressed to be paid by Ellen Palmer and the plaintiff, R. P. Chambers assigned unto Ellen Palmer and the plaintiff, their executors, administrators, and assigns, certain leasehold premises, to hold the same unto the said Ellen Palmer and the plaintiff, their executors, administrators, and assigns, from March 25 then last, part of the residue of the term of years granted by the lease under which the same premises were then held.

3. The said sum of 500*l.* was in fact provided by Thomas Palmer, and the said assignment effected by the last-mentioned indenture was in fact made to Ellen Palmer and the plaintiff by his direction.

4. On July 17, 1859, Ellen Palmer intermarried with Augustus John Greenhead; but no settlement or agreement for a settlement was executed or entered into on the occasion of the marriage.

5. By an indenture dated June 24, 1889, and made between Charles Fox Thomas of the one part and Ellen Greenhead and the plaintiff of the other part, in consideration of the sum of 600*l.* paid by Ellen Greenhead and the plaintiff to Charles Fox Thomas, the said Charles Fox Thomas assigned unto Ellen Greenhead and the plaintiff, and to the survivor of them, a certain leasehold house, now known as No. 2, Caithness Road, Hammersmith, in the county of Middlesex, to hold the same

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unto the said Ellen Greenhead and the plaintiff, and to the survivor of them, for the residue of the term for which the same were then held. The said sum of 600*l.* was provided by Ellen Greenhead and the plaintiff, with the concurrence of Augustus John Greenhead, in equal shares, out of the proceeds of the sale of certain real estate to which Ellen Greenhead and the plaintiff became entitled as co-heiresses of their father, Thomas Palmer.

6. Ellen Greenhead died on August 21, 1895, having by her will, dated June 22, 1895, given all her property, both real and personal, to her husband, Augustus John Greenhead, absolutely.

7. Augustus John Greenhead died intestate on October 22, 1895.

8. The defendants were the co-heiresses and sole next of kin of Augustus John Greenhead, and the defendant Louisa Rich was also legal personal representative of Ellen Greenhead and of Augustus John Greenhead.

9. From the date of the marriage of Ellen Greenhead to the date of her death the whole of the rents of the several above-mentioned properties were collected by Augustus John Greenhead, and were treated as a common fund applicable for the maintenance and benefit of his wife and himself, and also of the plaintiff, who resided with them.

10. During the lifetime of Ellen Greenhead the properties referred to in paragraphs 1 and 2 were dealt with in the following manner, namely,

(*a.*) As to the freehold premises referred to in paragraph 1:—

By an indenture dated October 12, 1865, and made between Augustus John Greenhead and the plaintiff of the one part, and James Mills of the other part, the said premises were demised to James Mills for a term of twenty-one years.

By an indenture dated February 26, 1885, and made between Augustus John Greenhead and the plaintiff of the one part and Robert Stephen Henry Edwards of the other part, the said premises were demised to Robert S. H. Edwards for a term of twenty-one years.

(*b.*) As to the leasehold premises referred to in paragraph 2:—

By an indenture dated May 1, 1867, and made between A. J. Greenhead and the plaintiff of the one part and Henry Bridge of the other part, the said premises were demised to Henry Bridge for a term of twenty-one years.

By an indenture dated March 31, 1888, made between Augustus John Greenhead and the plaintiff of the one part and Joseph Ellis of the other part, the said premises were demised to the said Joseph Ellis for a term of twenty-one years.

11. The leasehold house referred to in paragraph 5 had not been dealt with or disposed of in any way, but was occupied by Ellen Greenhead, A. J. Greenhead, and the plaintiff until the death of Ellen Greenhead.

The questions submitted for the opinion of the Court were:—

1. (1.) Whether by the conveyance of January 19, 1854, the premises thereby conveyed were vested in Ellen Greenhead and the plaintiff as joint tenants, and (2.) if so, whether the joint tenancy was severed by the marriage of the said Ellen Greenhead?

2. Whether, assuming question 1 (2.) was answered in the negative, the joint tenancy was otherwise severed?

3. The like questions with respect to the leasehold premises assigned by the indenture of April 29, 1856?

4. Whether the joint tenancy created by the assignment of June 24, 1889, was ever severed?

5. In whom the several properties herein referred to were now respectively vested?

T. A. Nash, for the plaintiff. The effect of the conveyance of 1854 and the two assignments of 1856 and 1889 was to vest the respective properties in them as joint tenants. As to the freeholds, marriage alone does not operate as a severance. Where the property is of such a nature as by force of the marriage to vest in the husband, then there is a severance; but if the act of marriage does not vest the property in him, then there is no severance of the joint tenancy. The principles are fully dealt with in *In re Butler's Trusts* (1), which, however, was a case of joint tenancy in a chose in action.

(1) (1888) 38 Ch. D. 286.

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There is no direct authority as to the effect of marriage upon a joint tenancy in freeholds; but that is an à fortiori case.

Again, the granting of the leases by the husband and the plaintiff did not effect a severance. Greenhead was entitled to grant leases under the Settled Estates Acts, 1856 and 1877 (19 & 20 Vict. c. 120, s. 32, and 40 & 41 Vict. c. 18, s. 46). Further, there is no sufficient indication of any intention by the parties to treat the joint tenancy as severed: *Williams* v. *Hensman* (1); *In re Wilks.* (2)

Rowden, for the defendants. I admit that both as to the leaseholds and the freeholds a joint tenancy was created; but in considering the question whether there has been a severance or not, it must be borne in mind that the Court always leans against joint tenancy: *Lake* v. *Craddock.* (3) As regards leaseholds, it must be admitted that there are dicta, if no express decision, that marriage alone does not work a severance of a joint tenancy; but in *In re Barton's Will* (4) and *Armstrong* v. *Armstrong* (5) the funds were reversionary, and in *In re Butler's Trusts* (6) the ratio decidendi was the vesting of the property in the husband. Here the granting of the leases by the husband was, in the language of Bowen L.J., novus actus interveniens, which of itself works a severance.

[STIRLING J. An assignment, no doubt, of the whole interest is a severance; but is an assignment of a partial interest enough?]

Yes. I submit that an underlease of one year out of a term of 1000 years would be enough. You cannot go into the length of the sub-term.

The effect of the disposition is to sever the joint tenancy, and at the end of the term the wife would hold as tenant in common.

[*Nash* referred to Coke on Litt. lib. 3, cap. 4, 191 b.]

Yes, a lease by one is a good severance: *Williams* v. *Hensman.* (1) There is nothing to shew that the disposition in order to work a severance must be of the whole interest.

(1) (1861) 1 J. & H. 546.
(2) [1891] 3 Ch. 59.
(3) (1732) 1 W. & T. L. C. (5th ed.) 205.
(4) (1852) 10 Hare, 12.
(5) (1869) L. R. 7 Eq. 518.
(6) 38 Ch. D. 286.

Then as to the freeholds. There is no authority, but I submit that the principle laid down in *In re Butler's Trusts* (1) applies.

Marriage does vest in the husband an estate in the wife's freeholds; and that brings the case within the dicta of Lindley L.J. and Bowen L.J.

The severance takes effect once and for all. It can only be got over by shewing that nothing vests in the husband.

In *Baillie* v. *Treharne* (2) it was held that marriage operated to sever a joint tenancy of the wife in personal estate in expectancy on the death of a person who died during the coverture. Then, as to the after-acquired leaseholds, I submit that the presumption of joint tenancy is rebutted: *Lake* v. *Craddock*. (3)

[STIRLING J. What is said by Page Wood V.-C. in *Robinson* v. *Preston* (4) seems to be against you.]

Nash, in reply. Here the money was provided in equal shares by the ladies, and the form of the deed is conclusive. As to the effect of the leases, they were leases not by one joint tenant but by both: Co. Litt. p. 191 b.

As to the freeholds, the property is not vested in the husband separately from the wife: 1 Bright on Husband and Wife, p. 112.

Rowden referred to Williams on Real Property, 10th ed. p. 216.

Cur. adv. vult.

Dec. 9. STIRLING J., after stating the facts, continued:— There is no question that as to the property mentioned in paragraphs 1 and 2 a joint tenancy was originally created.

The first point raised was whether the marriage of Ellen Greenhead effected a severance of the joint tenancy. As regards the leaseholds it is clearly laid down in Co. Litt. 185 b, and 351 a, and in the case of *Bracebridge* v. *Cook* (5), that marriage does not sever the joint tenancy; and this statement of the law has

(1) 38 Ch. D. 286.
(2) (1881) 17 Ch. D. 388.
(3) 1 W. & T. L. C. (5th ed.) 205.
(4) (1858) 4 K. & J. 505, 510, 511.
(5) Plowd. 416.

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recently been recognised as accurate by the Court of Appeal in *In re Butler's Trusts*. (1) Consequently it was conceded in argument that there was no severance of the joint tenancy in the leaseholds by the marriage of Ellen Greenhead. It was said, however, that there was no authoritative statement of the law, and no decision that marriage did not effect a severance of a joint tenancy in fee. It certainly appears to be true that there is not to be found in Co. Litt. any express statement of the law similar to that found at page 185 b, as to leaseholds; but I cannot bring myself to doubt that the law was settled in the same sense in Lord Coke's time, and has been so ever since. I arrive at that conclusion from a consideration of what is laid down in Co. Litt. with reference to curtesy. In the first place, it is distinctly laid down in Litt. s. 45, that a wife is not entitled to dower out of lands held by her husband jointly with another at the time of his death, but that she is where her husband holds lands in common with another. Then, dealing with the case of curtesy, Lord Coke says, at p. 30 a: "Some have said that in divers cases a man shall by having of issue be tenant by the curtesie where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heires of their two bodies begotten, and one of them take husband and have issue and die, the inheritances being severall the husband shall be tenant by the curtesie, as it is adjudged 7 E. 3, and in other bookes this judgment is cited and allowed. But certaine it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, she shall not be endowed, for no estate in the land is altered by that marriage." Then he leaves the reader to form his own opinion. Subsequently, commenting on s. 283 of Littleton, he says, at p. 183 a: "Here Littleton hath well resolved a doubt; for of ancient time it hath been said that when lands have been given to two women and to the heires of their two bodies begotten (which case our author putteth in the next section) that the husband having issue should be tenant by the curtesie living the other sister; for that as some held the inheritance was executed,

(1) 38 Ch. D. 286.

and that the sisters were tenants in common in possession, and consequently the husband to be tenant by the curtesie, which he could not be if the women had a joynt estate for terme of their lives; and likewise it was said that the issue of the one should recover the moytie in a formedon living the other sister."

It appears to me that Lord Coke was of opinion that a husband was not entitled to curtesy of lands held by his wife jointly with another; that there had been a doubt whether that applied to the case where lands were held under a grant to two women and the heirs of their bodies, but that this had been disposed of by Littleton. There is no suggestion of any doubt as to the case of lands held under a grant to two women and their heirs; and in all modern text-books which I have examined (it is enough to refer to three, namely, 1 Roper on Husband and Wife, 2nd ed. pp. 11–12; Burton's Compendium, pl. 353; Williams on Real Property, 17th ed. p. 281), the law is stated to the effect that there is no right of curtesy in respect of an estate held in joint tenancy, but that the right does exist in respect of an estate held under a tenancy in common. It is obvious that such a statement of the law is inconsistent with the view that marriage of itself converts a joint tenancy in fee into a tenancy in common, and I may add that I have not found in the books any trace of such a doctrine.

The next point raised was whether the grant of the leases stated in paragraph 10 did not effect a severance. The law as to severance being effected by alienation is very old, and is to be in found in Litt. s. 292, under the heading "Of tenants in Common." He says: "Tenants in common are they, which have land or tenements in fee simple, fee taile, or for terme of life &c., and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and pro indiviso to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joynt title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man infeoffe

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two joyntenants in fee, and the one of them alien that to which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common, because they are in such tenements by severall titles, for the alienee commeth to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffement made to him and to his companion &c. And so they are in by severall titles, that is to say, by severall feoffments, &c." Lord Coke commenting upon that says: "It appeareth, that the essential difference between joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, and tenants in common by severall titles, or by one title and by severall rights; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie is common to them both viz. that their occupation is invided, and neither of them knoweth his part in severall." It is to be observed that what is laid down there by Littleton is as to the result of an alienation by one of two joint tenants "of that which to him belongeth," i.e. his own share or interest; but when the joint tenants or the persons claiming under them unite in the conveyance the result may be very different. That appears from what is laid down by Lord Coke at p. 188 a: "If two femes be joyntly seised, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have severall writs of cui in vitâ at their election; but when they have recovered in those severall writs, they shall be joyntenants againe. But if the barons had aliened severally, this had been a severance of the joynture for a time, for the reason abovesaid."

In the present case the leases were granted, not by Augustus Greenhead alone, but by him and the plaintiff; and the rent was reserved to them jointly. Whatever effect the grant of a lease by Augustus Greenhead alone might have been, I fail to see that the grant of such leases by him and the plaintiff created a several title or several rights in any one. The tenants under those leases derived title under both the lessors; their position is

totally different from that of an alienee of one moiety of the lands held jointly. It may be possible that a lease might be granted by the husband of a joint tenant and the other joint tenant in such form that a severance would be necessary to give effect to it; but this does not seem to be the result in the present case. I think, therefore, that the granting of the leases did not effect a severance.

It was next contended that the facts stated in paragraph 9 of the special case constitute a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common in accordance with the law laid down by Lord Hatherley, when Vice-Chancellor, in *Williams* v. *Hensman*. (1) All I can say is that that does not appear to me to be the necessary inference from the facts.

Finally it was urged that, however the case might be as regards the two properties hitherto considered, the case was different as regards the property mentioned in paragraph 5 of the case. In *Robinson* v. *Preston* (2) Lord Hatherley stated the rule with regard to investment of money in the names of two or more persons. He said: "The law is settled as to the investment of money in the names of two or more persons in the purchase of property. If invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, and the matter on the face of it purports to be a joint tenancy, then it is considered by this Court to be a joint tenancy, and no equity is supposed to intervene by which it can be reduced to a tenancy in common."

No doubt under special circumstances that rule may be departed from. And in the particular case of *Robinson* v. *Preston* (2) it was held that under the circumstances the property belonged to the two sisters as tenants in common notwithstanding that they had contributed equally; but the circumstances of that case were very peculiar, and the source of the property was only one of several, and not the circumstance on which the Vice-Chancellor mainly relied. It seems

(1) 1 J. & H. 557. (2) 4 K. & J. 510.

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to me that in the present case the general rule applies, and that there is nothing in the special facts disclosed by the special case to shew either that a tenancy in common was created in the property, or that the joint tenancy has been severed.

Solicitors: *Collins & Cook.*

G. A. S.

STIRLING J. 1896 *Nov.* 25, 26; *Dec.* 15.

In re WEBB. STILL *v.* WEBB.

[1892 W. 353.]

Solicitor—Bill of Costs—General Order under the Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *Sched. I., Part I., r.* 8; *Part II., r.* 5—*Scale Charge—Sale by Auction of Leaseholds—Underlease.*

Leasehold property held with other property under one lease was sold by auction subject to a condition that the purchaser should accept an underlease for the whole of the unexpired term less three days at an apportioned ground-rent. The vendors' solicitors by virtue of rule 5 of Part II. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, claimed to be entitled to a scale charge in respect of the price and to a further scale charge in respect of the rent:—

Held, that the transaction though carried out by an underlease was in fact a sale, and that the solicitors were not entitled to a charge in respect of the rent; but *quære* whether this was not business not provided for by Sched. I., and therefore to be charged for according to the old system as modified by Sched. II.

THIS was a summons which raised a question as to the propriety of certain items charged by the plaintiffs, Messrs. Still, in respect of the costs of the sale of certain leasehold premises directed by an order in the above action dated May 31, 1894.

The circumstances which gave rise to the summons were as follows: The testator in the action, William Webb, left his estate among his four children, giving each child a life interest with remainder to the children of that child. In 1894 a question arose as to the construction of the will, which was the subject of this action, and that question was decided, and by an

order of May 31, 1894, it was ordered that certain costs should be allowed out of the estate, and should be separately certified as payable out of corpus, and that those costs should be raised by the sale or mortgage of the leasehold premises therein mentioned. Accordingly Messrs. Still, who were solicitors and the trustees of the will, caused certain leasehold property in Rotherhithe to be put up for sale by auction in two lots. Lot 1 was described in the particulars as being held upon a lease for a term of ninety years from June 24, 1860, at a ground-rent of 8*l.* for the three houses. Lot 2 was described as being held upon lease with other property for ninety years from September 29, 1860, and it was stated that an underlease would be granted for the whole of the unexpired term less the last three days at an apportioned ground-rent of 2*l.* per annum.

The property was sold subject to conditions which provided (clause 4) as follows: "The title to Lot 1 shall commence with an indenture of lease dated the 3rd day of June, 1862, under which the property is held. The title to Lot 2 shall commence with an indenture of lease dated the 12th day of May, 1864, under which this and other property is held; and on the completion of the purchase the vendors will grant and the purchaser shall accept an underlease of the property so purchased by him for the whole of the unexpired term under the said lease less the last three days thereof at an apportioned ground-rent of 2*l.*"

The two lots were sold for 250*l.* and 200*l.* respectively, and the sale of Lot 2 was carried into effect by means of the underlease mentioned in the conditions of sale. In May, 1896, two accounts were sent by Messrs. Still to Mr. Chapman, the solicitor who acted for persons interested to the extent of one moiety in the property the subject-matter of the action. One of these accounts was an account of income payable to the tenants for life of two-fourths of the estate; the other was an account of the proceeds of sale. A correspondence then took place between Messrs. Still and Mr. Chapman, in the course of which objections were raised to two items in the second account. The first was an item of 4*l.* 4*s.*, a fee paid to certain estate agents for valuing the property with a view to the sale. The

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objection to this was that the fee was excessive and ought to be reduced to 2*l.* 2*s.* The second item was a sum of 15*l.* 15*s.*, the remuneration claimed by Messrs. Still for the sale of the property. This item was arrived at thus:—

	£	*s.*	*d.*
"Costs of sale of Lot 1 according to the Solicitors' Remuneration Act for which the consideration money amounted to £250	5	0	0
"Costs of sale of Lot 2 which was by way of underlease at a ground-rent of £2, and the consideration money amounted to £200, being £5 in respect of the said rent and £5 in respect of the consideration according to the said Act . .	10	0	0
"Stamps on counterpart lease	0	5	0
"Plan	0	10	0
	£15	15	0."

The objection to that was that the costs of the sale of Lot 2 ought to have been the same as the costs of the sale of Lot 1, namely, 5*l.*

Messrs. Still declined to give way to these objections, and insisted that they were right.

Mr. Chapman then commenced two actions in the Lord Mayor's Court, claiming payment by Messrs. Still of the sums alleged to be due to his clients for income, and over and above that a proportionate part of these items. Thereupon Messrs. Still took out this summons in the action in the Chancery Division, asking that the objections taken by Mr. Chapman on behalf of his clients to the items in question might be adjudicated upon by the Court; and they also obtained an order for a stay of the proceedings taken out in the Lord Mayor's Court, pending the determination of the questions raised by this summons.

Howard Wright, for the plaintiffs. By the combined effect of rule 5 of the rules applicable to Part II. of Schedule I. to the

General Order under the Solicitors' Remuneration Act, 1881, and rule 8 of the rules applicable to Part I. of the same schedule, the plaintiffs are entitled in the case of Lot 2 to the minimum scale charge of 5*l.* in respect of the premium or consideration money, and to the further minimum scale charge of 5*l.* in respect of the rent: *In re Hellard and Bewes.* (1) It may be said that Part II. of the schedule does not relate to a lease granted for the purpose of carrying out a sale; but the schedule is silent about it, and there is no ground for excluding such a transaction from its operation.

The reason why this mode of sale was adopted in the one case and not in the other was that Lot 2 was held with other property under one lease, and there might be a difficulty in obtaining the consent of the superior landlord to an apportionment of the ground-rent.

That it was not the intention of the schedule to ground the charge merely upon the amount of work done appears from *In re Robson.* (2)

Upjohn, for the respondents. This is a sale, and the question is whether a solicitor can carry out a sale in such a way as to give him double the remuneration to which he would have been entitled if the sale had been carried out in the ordinary way. The fact that this is a sale distinguishes this case from *In re Hellard and Bewes.* (1) Rule 2 of the General Order, which determines the mode of remuneration to be adopted, refers to transactions, not to instruments and documents; and the question is with what sort of transaction is this business connected. It is submitted that this is business connected with a sale, and therefore the scale in Part I. of Schedule I. applies. That scale applies to sales, purchases, and mortgages, however carried out.

Suppose the plaintiffs had raised the money by mortgage, and had mortgaged the premises by a sub-lease, could it be said that they would have been entitled to remuneration as on a lease?

Again, test the question in this way. The plaintiffs are trustees seeking to retain their costs, charges, and expenses properly incurred out of the trust estate; but they are acting

(1) [1896] 2 Ch. 229. (2) (1890) 45 Ch. D. 71.

STIRLING J. under a power to sell or mortgage, and have no power to lease. Therefore, if this transaction is a lease they are acting ultra vires, and are not entitled to their costs.

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If in substance the transaction is a sale, it falls under Part I., but if a lease it falls under Part II.

Howard Wright, in reply. The heading to the rules applicable to Part II. shews that they embrace all leases or conveyances at a rent. This transaction, being a sale carried out by an underlease, falls under this heading, and, therefore, rule 5 applies. In an Act for the remuneration of solicitors it is to be presumed that technical words are used in their strict sense.

Cur. adv. vult.

Dec. 15. STIRLING J., after stating the facts and expressing his opinion that there was no impropriety in the mode of sale adopted in the case of Lot 2, continued as follows :—

With the proceedings in the Lord Mayor's Court I have nothing to do, and I do not desire to prejudice the decision of those proceedings, but commenting upon them as a matter of history, I confess that an action in the Lord Mayor's Court does not seem to me to be an appropriate mode of obtaining a decision upon the question whether these two items to which Mr. Chapman objects are correct. I agree with the plaintiffs that if this matter was to be litigated at all it is better that it should be litigated in this Court under the liberty reserved in the order of May 31, 1894, than in the Lord Mayor's Court.

It is to be observed that the plaintiffs claim remuneration according to the scale under the Solicitors' Remuneration Act, 1881. The contention on behalf of the respondents, who are the tenants for life of two-fourths of the property in question, and their children, is that, according to the scale, the plaintiffs are not entitled to 10*l.* in respect of Lot 2, but only to 5*l.* The contention of the plaintiffs turns upon Schedule I., Part II., to the General Order under the Solicitors' Remuneration Act, which begins thus : "First Scale. Scale of Charges as to Leases. . . . . at Rack Rent (other than a mining lease, or a lease for building purposes, or agreement for the same)." I may pass over that

scale and come to the second scale, which is as follows: "Scale of Charges as to Conveyances in fee, or for any other freehold estate, reserving rent, or building leases reserving rent, or other long leases not at rack rent (except mining leases) or agreements for the same respectively." Then there are certain rules applicable to Part II. of Schedule I. Rule 5 is as follows: "Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." Now, if that rule governs this case, then, according to the decision of North J. in *In re Hellard and Bewes* (1), the plaintiffs have claimed the correct sum; but it is denied by the respondents that that rule has any application, and in my opinion the respondents are right. It is true that these rules are headed "Rules applicable to Part II. of Schedule I., as to all leases or conveyances at a rent, or agreements for the same, other than mining leases and agreements therefor"; but, in my opinion, that heading does not extend the application of Part. II. of Schedule I., but applies only to conveyances in fee or for any other freehold estate reserving rent and to building leases and other long leases not at a rack rent, excepting mining leases. Now, the first question is, Can this transaction be treated as a conveyance within the meaning of Part II. of Schedule I.? I answer, No, because it is not a conveyance in fee or for any other freehold estate. Then, is it a lease? In a sense, no doubt, it is a lease, but in truth it is a sale. It is described as a sale in the conditions of sale, and it is so described in the plaintiffs' bill of costs. It is a sale carried out by an underlease, which is a well-known conveyancer's expedient, where the property sold is held with other property under one lease, to avoid an apportionment of the rent, about which there might be a difficulty with the superior landlord. Therefore the rule relied upon by the plaintiffs does not apply. Then, what rule, if any, does apply? If there is anything in the rules which entitles the plaintiffs to

(1) [1896] 2 Ch. 229.

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the scale charge it must be Part I. of Schedule I., which applies to sales and purchases as well as mortgages, and extends to leaseholds. There remains a doubt in my mind whether this transaction does not fall within rule 2 (*c*) of the General Order, and whether it is not "business the remuneration for which is not hereinbefore or in Schedule I. hereto provided for," in which case the remuneration would be under the old system as altered by Schedule II. But that would be a departure from the bill of costs delivered by the plaintiffs; and, in my opinion, this litigation has not been attended with such benefit to the estate that I ought to allow it to be continued any longer. If, therefore, I have to decide whether under the scale this sum of 10*l.* is rightly charged, I must say I think that it is not.

The second question is whether the fee paid to the surveyors is excessive. That is a pure question of quantum, which is a matter to be determined by the taxing master. From the manner in which these proceedings have been taken out, I have not had the benefit of his opinion; but I am informed by my chief clerk that he does not consider this charge excessive, and I agree with that view. The result is that on one item the respondents succeed, and on the other they fail.

I have now to deal with the question of costs. Each party succeeds and each party fails to a certain extent. The whole benefit to the estate from this litigation is the sum of 50*s.* I think it deplorable that these two small items should have been litigated to this extent, and I am not disposed to make any order beyond what I am compelled to. The only order which I make as to costs is that the plaintiffs are to have their costs as between solicitor and client of so much of the summons as relates to the valuers' fee out of the moiety of the estate in which the respondents are interested.

Solicitors: *Trower, Freeling & Parkin; R. Chapman.*

H. B. H.

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Nov. 25; *Dec.* 16.

[1896 W. 1433.]

Practice—Service out of the Jurisdiction—Scotland—County Court Rules, 1889, *Order* LI., *r.* 23—*Rules of the Supreme Court*, 1883, *Order* XI., *rr.* 1 (*d*), 2—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 67, 68, 164—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 17—*Waiver.*

Rule 23 of Order LI. of the County Court Rules, 1889, which relates to service out of the jurisdiction, though more extensive than any existing rule applicable to the High Court, is within the powers of making rules conferred by s. 164 of the County Courts Act, 1888.

Service having been effected in Scotland under Order LI., r. 23, of the County Court Rules, 1889, on a defendant in an administration action, the action was transferred to the High Court on the ground that the value of the estate exceeded the limit of the jurisdiction of the county court. The defendant answered interrogatories in the county court, but objected to the order for service both in the county court and the High Court:—

Held, that, though the order for service would have been valid if the action had remained in the county court, after the transfer, the question depended upon Order XI., rr. 1 (*d*), and 2, of the Rules of the Supreme Court, and that the defendant ought to have an opportunity of filing evidence as to the domicil of the testator, and as to whether there was an adequate concurrent jurisdiction in Scotland:

Held, further, that there had been no waiver by the defendant of the right to object to the service.

THIS action was transferred from the county court of Cumberland to the High Court, and the present summons was the first step taken in the action since the transfer to the High Court. The summons was taken out by the plaintiff, and asked for further and better answers to interrogatories. This was resisted on the ground that the action was brought without jurisdiction, inasmuch as there was no power to serve the defendant out of the jurisdiction. The action was commenced by a summons issued in the county court on February 27, 1896, and by it the trial was fixed for April 15. It appeared from the claim that the plaintiff claimed 116*l.*, and that the defendant Catherine Middleton, widow, was sued as trustee by representation of Robert Hartley, deceased, and the defendant was

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described on the face of the summons as being of 3, Ednam Street, Annan, Scotland, and consequently out of the jurisdiction. The substance of the case was that Robert Hartley, whose will was sought to be administered, bequeathed to the plaintiff a legacy of 100*l.* to be paid on his attaining twenty-one, with certain directions as to investment in the meantime, and he appointed one Middleton sole executor and trustee of his will. The testator died in 1879. Middleton proved the will and invested the legacy on what was alleged to have been an improper investment. He died on January 31, 1886, having appointed his widow, the defendant, and another person executors of his will. Both proved, and the defendant was the surviving executor of the will. The plaintiff attained twenty-one on March 26, 1892, and he claimed a declaration that the investment by Middleton was a breach of trust, and that the defendant was liable to make good the loss thereby sustained with interest at 4 per cent., and administration of the personal estate of the testator. On February 26, 1896, an affidavit was made by the plaintiff's solicitor, from which it appeared that the defendant formerly resided in Cumberland, but had recently removed to a residence in Scotland, that the defendant's solicitors had agreed to accept service on behalf of the defendant of any process issuing out of the Scottish Courts, and that according to the belief of the plaintiff's solicitor the defendant was then resident in Scotland out of the jurisdiction. Upon that affidavit the registrar, on February 27, 1896, gave liberty to the plaintiff to serve the defendant in Scotland, and the defendant was served accordingly. On March 19 an order was made in the county court giving the plaintiff leave to deliver interrogatories, and these were answered on April 2. Before this was done the defendant's solicitors gave notice to the plaintiff's solicitors that the defendant objected to the jurisdiction. This objection was based on two grounds: first, that the estate was beyond the limits of the jurisdiction of the county court; secondly, that the process had been served out of the jurisdiction. On April 11 notice of motion was given by the plaintiff's solicitors that on April 15, the date of the trial, the Court would be moved that the defendant should be ordered to

give a further and better answer to the interrogatories. The case came on for trial on April 15, and the defendant raised the two objections above mentioned. The county court judge was satisfied that the estate exceeded the limit of 500*l.*, and ordered the action to be transferred to the High Court, and he decided nothing as to the second objection. On May 13 the present summons was taken out, and, the defendant objecting to the jurisdiction, the matter was adjourned into court.

H. Terrell, for the plaintiff. Rule 23 of Order LI. of the County Court Rules, 1889, is a clear authority for the service which has been effected, and, apart from the question of the amount of the testator's estate, this action was properly commenced in the county court. Sect. 68 of the County Courts Act, 1888, under which this action was transferred to the High Court, provides that the anterior proceedings in the action shall not be disturbed. The service, therefore, still remains good.

Further, the defendant, by answering the interrogatories delivered to her in the county court, must be taken to have waived her right to object to the service. As a matter of practice no appearance is entered in the county court; but in the High Court entry of appearance, if unconditional, operates as a waiver, the principle being that if a defendant takes any step in an action that is a submission to the jurisdiction and a waiver of any irregularity.

J. Sharpe, for the defendant. This service is bad under the county court rule. The "absence" there referred to must mean the absence of such a defendant as is ordinarily resident within the jurisdiction. It cannot have been intended to give the county court wider powers with regard to service out of the jurisdiction than the High Court. The rule which applies to the High Court is rule 1 (*d*) of Order XI. of the Rules of the Supreme Court, and the conditions of that rule have not been complied with. The Court ought to have ordered the action to be struck out under s. 114 of the County Courts Act, 1888. The defendant gave notice of objection to the jurisdiction before answering the interrogatories. There has, therefore, been

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no waiver: *Rein* v. *Stein* (1); *Firth & Sons* v. *De Las Rivas*. (2) [He also cited *Weatherley* v. *Calder & Co.* (3)]

H. Terrell, in reply.

[STIRLING J. The Court ought to have regard to rule 2 of Order XI. in exercising its discretion as to permitting service in Scotland.]

The machinery provided for service by the High Court is different from that provided by the county court. The county court rule is wider than the High Court rule, and there is nothing to cut down its generality.

Cur. adv. vult.

Dec. 16. STIRLING J., having stated the facts substantially as above set out, continued as follows:—The jurisdiction of the county court to entertain the action depends on the County Courts Act, 1888, s. 67, cl. 1, which gives the Court jurisdiction in administration actions where the estate does not exceed in value the sum of 500*l*. Then s. 68 provides that "if during the progress of any action or matter under the last preceding section it shall be made to appear to the judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited it shall not affect the validity of any order already made, but it shall be the duty of the judge to direct the action or matter to be transferred to the Chancery Division of the High Court; and the whole of the procedure in the said action or matter when so transferred shall be regulated by the rules of the Supreme Court." Sect. 164 provides for the framing of rules for the county courts, and, to put it shortly, that section confers on the authorities who frame the rules for the county courts the same power with regard to making rules as to matters of procedure and practice as exists in the High Court. Now the power of making rules in the High Court is to be found in s. 17 of the Judicature Act, 1875. The material portion of that section is that the authorities there mentioned may make rules for (inter alia) the

(1) (1892) 66 L. T. (N.S.) 469. (2) [1893] 1 Q. B. 768.
(3) (1889) 61 L. T. (N.S.) 508.

following matters: "(2.) for regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and (3.) generally, for regulating any matters relating to the practice and procedure of the said courts respectively . . . ." Under that power rules have been made with which we are all familiar, including Order XI., which deals with service out of the jurisdiction. This particular case would be regulated by rule 1 (*d*) of Order XI., which provides for service out of the jurisdiction whenever "the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction." Rule 2 is also important as to service in Scotland or Ireland. [His Lordship read the rule, and continued:—] It appears from these rules that there are two matters as to which limitations are imposed upon the jurisdiction of the High Court. First, service is to be permitted only when the testator dies domiciled within the jurisdiction. And, secondly, where there is a concurrent remedy in Scotland, the Court is to exercise a discretion and to have regard to the comparative cost and convenience of proceeding in England or in the place of residence of the defendant. Then, what rules have been made by the authorities for the county court? The rule applicable to service out of the jurisdiction is rule 23 of Order LI. of the County Court Rules, 1889. It runs thus: "Where a defendant, sued under s. 67 of the Act, shall be out of England or Wales, the judge, or in his absence the registrar, may, upon an affidavit of the fact, direct the service of the summons to be effected within such time and in such manner as the judge or registrar may think fit." That is on the face of it a very different rule from that which prevails in the High Court; but can I say that that is a rule which it is beyond the powers of the proper authorities to make under s. 164 of the County Courts Act, 1888? Under that section the power of making rules extends "to all matters of procedure or practice, or relating to or concerning the effect or operation in law of any procedure or practice, in any case within the cognizance of county courts, as to which rules of the Supreme Court have been or might lawfully be made for cases within the cognizance of the High Court of Justice."

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I cannot say that such a rule as this one might not lawfully be made for cases within the cognizance of the High Court. I come, therefore, to the conclusion that that rule is within the powers of the framers of the rules under s. 164, and that being within those powers it authorizes the service which has actually been effected. The objection, therefore, to the jurisdiction upon the ground of service could not have been effectually raised if the matter had remained in the county court.

But now comes this peculiar state of things. The county court judge decided that this was a case beyond the county court limits as regards the amount of the estate, and that consequently the action ought not to have been brought there. Now, there is no evidence which satisfies me that this action, if it had been originally brought in the High Court, could have been entertained; and I think it would be an extraordinary thing that a person commencing an action in the county court should be able to transfer the action to the High Court and prosecute it there when it could not have been entertained in the High Court, if it had been brought there in the first instance. In my opinion, therefore, the defendant ought to have an opportunity of shewing that this action is one which could not have been brought in the High Court.

The question was raised whether the defendant by submitting to answer interrogatories had not waived her right to object to the jurisdiction. But in the view which I take of this case, no question of waiver could have arisen while the action was in the county court; and I think that there has been no such waiver here as to deprive the defendant of her right to shew that this is a matter which ought not to be prosecuted in the High Court. The present summons must, therefore, stand over in order that such an opportunity may be given to the defendant. But I desire to add this—that the step which ought next to be taken should in my opinion be as inexpensive as possible; and if the parties are willing, I will dispense with the necessity of taking out any further summons, and will send the matter to chambers with a direction that the defendant shall be allowed to file evidence as to the domicil of the testator at his

death, and as to whether there is any adequate concurrent jurisdiction in Scotland. (1)

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Solicitors: *Andrew, Wood & Co., for H. J. Whiteside, Whitehaven; Helder, Roberts & Co., for Brockbank, Helder & Co., Whitehaven.*

(1) NOTE.—No such evidence was filed and the action proceeded in the High Court.

H. B. H.

KEKEWICH J.

1896

Oct. 30.

In re VICTORIA STEAMBOATS, LIMITED. SMITH *v.* WILKINSON.

[1896 V. 669.]

Company—Debenture-holder—Receiver and Manager—Debenture not actually due—Jurisdiction.

In an action by debenture-holders of a limited company to enforce their security, the Court has jurisdiction to appoint, not only a receiver of the company's property, but also a manager of its undertaking and business, where the security is in jeopardy—as for instance where the company is practically insolvent and there is a pending winding-up petition—notwithstanding that the security has not yet "crystallized" by the debenture debt having become actually due; but as the appointment of a manager is made only with a view to the probable necessity of realization it should extend for a limited period only.

THIS was a debenture-holder's action brought by the plaintiff on behalf of himself and all other the holders of "A" debentures of the defendant company, the Victoria Steamboats, Limited, against R. D. Wilkinson, the chairman of the board of directors, and the company. The plaintiff was a holder of two of the debentures for 500*l.* each, and was also one of the trustees of the trust deed securing the debentures. The defendant Wilkinson was the other trustee, and was also the holder of a debenture of the company of a class ranking after the "A" debentures.

The plaintiff now moved for the appointment of a receiver and manager of the undertaking and business of the company under the following circumstances.

The company, which was registered on October 25, 1895, was formed to take over as a going concern the undertaking of the Victoria Steamboats Association, Limited, then in liquidation. The undertaking consisted in the running of passenger steamers on the River Thames, and also of carrying on two ferry services at Greenwich and Woolwich under arrangements with the Great Eastern Railway Company. By each of the "A" debentures the company agreed that they would, on January 1, 1925, or on such earlier day as the principal moneys

thereby secured became payable in accordance with the conditions indorsed thereon, pay to the registered holder the principal sum therein mentioned; and would in the meantime, until such payment, pay to such holder interest thereon half-yearly at the rate of 5 per cent. per annum, the first half-yearly payment to be made on July 1, 1896. And the company thereby charged its undertaking and all its property, whatsoever and wheresoever, both present and future (including its uncalled capital for the time being) with the payments of the principal money and interest therein stated. The 10th condition indorsed on the debenture was as follows: "The principal moneys hereby secured shall immediately become payable, (*a*) If the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company, calls in such principal moneys; (*b*) If an order is made, or an effective resolution is passed, for the winding up of the company. . . ."

By the trust deed securing the "A" debentures, and which was dated July 20, 1896, and made between the company of the one part and the trustees of the other part, the company agreed (clause 26), during the continuance of the security and before entry by the trustees, to "carry on and conduct the business of the company to the greatest possible advantage"; and by clause 35 the company covenanted with the trustees that it "will duly perform and observe the obligations herein imposed on it."

The company worked their passenger service at a loss, and suspended it on October 6, 1896; but they were continuing their ferry services under their existing arrangements with the Great Eastern Railway Company.

On October 26 the writ was issued in the present action, the interest due on the "A" debentures on July 1, 1896, not having been paid.

On October 27 the London Graving Dock Company, Limited, as creditors, presented a petition for the winding up of the defendant company, the Victoria Steamboats, Limited, which petition was still pending. On the same day, upon motion by

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the plaintiff in the present action, Mr. W. S. Ogle was appointed receiver over October 30. On October 28 a judgment under Order XIV. was signed by Messrs. J. & C. Harrison, creditors of the defendant company.

On October 29 the plaintiff served the present notice of motion for the following day, October 30, for the continuance of Mr. Ogle as receiver, and for the appointment of a manager of the undertaking and business of the defendant company. On the same day, the 29th, an order was made by Vaughan Williams J., upon the application of the London Graving Dock Company, appointing one of the official receivers provisional liquidator of the defendant company, but solely for the purpose of appearing on behalf of the defendant company at the hearing of the present motion.

The motion now came on for hearing.

The main object of the application for the appointment of a manager was to enable the ferry business of the company to be carried on, the evidence shewing that if that business were suspended and the company thus became unable to fulfil the conditions of their contract with the Great Eastern Railway Company, the debenture-holders would be greatly prejudiced. The July interest on the "A" debentures still remained unpaid.

Renshaw, Q.C., and *C. E. E. Jenkins*, for the plaintiff. We ask that the receiver may be continued, and also that he may be appointed manager. The Court has jurisdiction to appoint a manager as well as a receiver at the instance of debenture-holders even where there is nothing actually due upon the debentures, provided it is satisfied that the security is in jeopardy, as it is here through the practical insolvency of the company and the presentation of the winding-up petition: *Edwards* v. *Standard Rolling Stock Syndicate*. (1) Under the circumstances the company cannot themselves carry on their business. It may be that the debenture debt has in fact become due, and the security therefore crystallized, through the failure of the company to perform the obligations of the trust deed.

(1) [1893] 1 Ch. 574.

P. S. Stokes, for debenture-holders ranking after the "A" debentures, supported the application.

W. R. Sheldon, for judgment creditors.

Upjohn, for the provisional liquidator. The property is not in jeopardy; the provisional liquidator will preserve the assets of the company for the benefit of all parties interested, and therefore there is no need for the appointment of a receiver or manager at all. The provisional liquidator merely supersedes the directors of the company.

KEKEWICH J. The essential thing to remember is that these debentures represented by the plaintiff have not—to use the newly adopted term—yet "crystallized." The case is one of debenture-holders having a charge upon all the property and assets of the company. There has been a winding-up petition presented, and in such a case it is very much a matter of course, certainly under such circumstances as I now have before me, to apply for the appointment of a receiver and manager. The plaintiff's counsel suggest that, inasmuch as there is a covenant in the mortgage deed by the company to carry on the business to the best possible advantage, and a winding-up petition has been presented, the covenant must have been broken, and therefore the debentures have crystallized. Possibly that would have been so had any covenant been in fact broken; but I would not decide that point without full argument. I think there is a good deal in the suggestion that at any rate, until a winding-up order has been made—that is, while there is only a petition pending—the company must be considered to be carrying on their business. In the absence of evidence that they have closed their doors, I cannot assume that the business is not being carried on, although we all know it frequently happens that the presentation of a winding-up petition does put a stop to a business. Subject to that, it is common ground that the debentures have not crystallized; therefore I start with the fact that that is so. The debenture-holders represented by the plaintiff ask—and they are supported by another class of debenture-holders—for a receiver, and it is argued that the

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assets are not in jeopardy. What has happened? A creditor has presented a petition for winding up this company. It is desired to place the liquidation of the company under the jurisdiction of the Court for the benefit of the shareholders and creditors; and so far their interests are not inimical to those of the debenture-holders, who would take precedence of them all; and it is desired, of course, by the representative of the shareholders and creditors, if possible, to squeeze out the debenture-holders. It would be giving a very narrow meaning to the word "jeopardy" to hold that because the security of the debenture-holders will be preserved they ought not to take care of themselves. That being so, I can appoint a receiver. That is mere protection.

Now comes the question which I have had to consider before, but have never been called upon actually to decide, and it is this—whether I can add to the appointment of a receiver the appointment of a manager; and about that I confess I have felt very great doubt. You cannot appoint a manager unless he can get the goodwill of the business which has been mortgaged and which is to be managed. There is no doubt that the language of the debentures is sufficient to cover, in the ordinary course, the appointment of a manager if the debentures have crystallized. But can I do it when they have not crystallized? That is the question; and it seems to me to depend upon this—that the jurisdiction to appoint a manager involves the necessity, or at any rate the probability, of an eventual sale. When the Court sees that the security can only be realized, and that the debenture-holders, the mortgagees, can only get their rights by means of a sale, then, and then only, will the Court appoint a manager to carry on the business with a view to a sale. The appointment is only with a view to a sale, the object being the more beneficial and complete realization. But when you cannot say that there is a likelihood of a sale taking place in the immediate future, can you appoint a manager? That has been my doubt, and one which has been entertained by other judges besides myself. On the whole, having had an opportunity of considering the point,

and seeing not only North J.'s conclusion in the case of *Edwards* v. *Standard Rolling Stock Syndicate* (1), and Mr. Macnaghten's argument in that case, which I consider to be to some extent incorporated into the judgment, I am satisfied that the Court has jurisdiction and ought to exercise it, and for this reason—that the charge of the debenture-holders is a subsisting one, though not immediately effective. So long as the debentures have not crystallized, the charge will not be effective, but the charge is there: everything has been done to make it a charge; and all that is wanted is something to call it into activity. Of course the Court would hesitate to appoint a manager where there is no reasonable probability of the charge being called into activity. I should be extremely reluctant to do so unless I saw that the property would have to be realized within a reasonable time. Here the company is about to be wound up; at any rate there is a probability, or a possibility, of a winding-up order being made. If it is made, then we shall certainly have, and may look forward in the near future to, the activity of the charge and the necessity for a realization, in some form or other, of the debenture-holders' security.

It seems to me that, on principle, I can appoint a manager notwithstanding that the debentures are not crystallized, where I see that such an appointment is necessary, not only for the protection of the debenture-holders, but also for the ultimate realization of what is due to them; and here the circumstances are such that I ought to do so. I therefore continue Mr. Ogle as receiver and appoint him manager; but his appointment as manager will at present be for a fortnight only.

Solicitors: *Hicks, Davis & Hunt; Hill, Son & Rickards; A. Williams & Co.; Keene, Marsland, Bryden & Besant.*

(1) [1893] 1 Ch. 574.

G. I. F. C.

KEKEWICH J.

1896

Dec. 10.

In re AIREY.
AIREY *v.* STAPLETON.

[1895 A. 776.]

Evidence—Presumption—Deed more than Thirty Years old—Appointment under Special Power purporting to be executed by Attorney of Donee—Power of Attorney not produced.

Where a deed, more than thirty years old, purports to be an appointment under a special power, and to be executed by the attorney of the donee of the power, although, by reason of the antiquity of the deed, the execution of it by the attorney as such ought to be presumed, yet there is no rule of law which requires or justifies the presumption by the Court that the attorney was duly authorized to execute the power.

Where, therefore, in support of such a deed, no power of attorney was produced, nor any evidence forthcoming as to the purport or contents of any such power, it was held that the title of the appointees claiming under the deed was not made out.

By the will of Margaret Morrogh, who died in 1845, certain property was bequeathed to Amelia Sarsfield Walsh, "that she may at the fit and proper time make such distribution of it to her four children, Francis Walsh, Henry Walsh, Amelia Walsh, and Carlotta Reid, as she may think right."

By a settlement dated December 19, 1851, and made between John Moore Cole Airey of the first part, Amelia Walsh of the second part, George Dennis Walsh and Amelia Sarsfield Walsh, his wife, of the third part, and Rawson H. B. Reid, Arthur E. Campbell, and Julius T. Airey of the fourth part (being the settlement made on the marriage of John Moore Cole Airey and Amelia Walsh), reciting agreements on the part of G. D. Walsh and Amelia S. Walsh to settle 6000*l.* 3 per cent. bank annuities to be raised out of the property bequeathed by Margaret Morrogh, and on the part of John Moore Cole Airey to settle a like sum of 6000*l.* 3 per cent. bank annuities, it was expressed that Amelia Sarsfield Walsh, in pursuance and exercise of the power given to her by the will of Margaret Morrogh, appointed and she and her husband jointly covenanted with Rawson H. B. Reid, Arthur E. Campbell, and Julius T. Airey,

to pay to them or enable them to purchase 6000*l.* 3 per cent. bank annuities to be held by them upon the usual trusts in favour of the intended husband and wife and the children of the intended marriage, and, in the event of there being no children of the marriage and Amelia Walsh dying in the life-time of John Moore Cole Airey, upon trust for such persons as at the time of her decease would have been entitled as her next of kin under the statutes for the distribution of intestate's effects to her personal estate in case she had died domiciled in England intestate and unmarried. The settlement contained a covenant by John Moore Cole Airey to bring into settlement 6000*l.* 3 per cent. bank annuities.

By the attestation clause it was stated that the settlement was signed, sealed, and delivered by Rawson H. B. Reid "for himself and as attorney for G. D. Walsh and Amelia Sarsfield Walsh his wife." The settlement purported to be executed by the several parties named in the following order: "J. M. C. Airey," "Amelia Walsh," "G. D. Walsh per Rawson H. B. Reid," "A. S. Walsh per Rawson H. B. Reid," "Rawson H. B. Reid," "Arthur E. Campbell," "Julius T. Airey," and the signatures appeared to be those of the several persons named other than G. D. Walsh and Amelia Sarsfield Walsh. In the margin there appeared the following signatures: "George Dennis Walsh," "Amelia Sarsfield Walsh."

The marriage of J. M. C. Airey and Amelia Sarsfield Walsh took place on December 20, 1851; but there was no issue of the marriage. Amelia Airey, the wife, died on March 9, 1881. Her husband survived her and died on July 30, 1889; and accordingly, on his death, assuming that the settlement of December 19, 1851, was an effectual appointment by Amelia Sarsfield Walsh under the power conferred by the will of Margaret Morrogh, the statutory next of kin of Amelia Airey became entitled under the settlement to the appointed property.

Previously to June, 1895, all the parties to the deed of December, 1851, with the exception of Julius T. Airey, had died. Various questions having arisen as to the rights of the several persons interested under that deed, Julius T. Airey took out the present summons for the determination of such questions,

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and first of the question whether or not in the events which had happened the funds brought into settlement by Amelia Sarsfield Walsh had become vested in the next of kin of Amelia Airey entitled under the ultimate gift above stated; and to this summons the persons representing such next of kin were made parties. Julius T. Airey died on October 16, 1895, and the proceedings were continued by the executors of his will, who were the present plaintiffs.

Upon the deed of December 19, 1851, being produced by the plaintiffs, it appeared that there were appended to it two memoranda, both dated February 28, 1852, and bearing the duly attested signatures of George Dennis Walsh and Amelia Sarsfield Walsh. Of these memoranda the first was a declaration to the effect that George Dennis Walsh and Amelia Sarsfield, his wife, directed and appointed that whether there should be issue of the marriage between John Moore Cole Airey and Amelia, his wife, or not, John Moore Cole Airey should, if he survived his wife, have a life interest in the 6000*l.* 3 per cent. Consols settled by Amelia Sarsfield Walsh unless he should become bankrupt or insolvent, in either of which cases the settlement should be read and construed as if he were then dead; and also, if there should be a failure of issue and Amelia Airey should die in the lifetime of the said John Moore Cole Airey, then the 6000*l.* stock should be held upon trust as she the said Amelia Airey, notwithstanding her coverture, might by her will or codicil direct or appoint, give or bequeath the same; and in default of such direction or bequest, then upon trust for her next of kin as in the settlement mentioned. The second memorandum was a covenant between George Dennis Walsh and Amelia Sarsfield, his wife, with John Moore Cole Airey, that the respective obligations of George Dennis Walsh and Amelia Sarsfield Walsh on the one hand, and John Moore Cole Airey on the other, should be limited to 5000*l.* as the sum brought into settlement on each side instead of the 6000*l.* mentioned in the settlement, and that three years should be allowed to George Dennis Walsh and Amelia Sarsfield Walsh for the realization and investment thereof.

It appeared that pursuant to the settlement and the second

memorandum George Dennis Walsh and Amelia Sarsfield Walsh had paid to the trustees of the settlement the sum of 5000*l.*, now represented by 5206*l.* 1*s.* 5*d.*, $2\frac{3}{4}$ per cent. Consolidated Stock, and John Moore Cole Airey also paid a like sum to the trustees.

Amelia Airey by her will bequeathed all property coming to her under the trusts of the settlement and memoranda to her husband, whom she appointed her sole executor, and under his will the property so bequeathed devolved upon his executors.

One of the plaintiffs, who was a member of the firm of solicitors who acted for the late plaintiff Julius T. Airey, and had for several years on behalf of his firm attended to the business arising under the deed of December 19, 1851, made an affidavit stating that, after the death of John Moore Cole Airey, Julius T. Airey caused inquiries to be made through the firm, from which inquiries, so far as could be ascertained, it appeared that the settlement was executed in the first instance in England by Rawson H. B. Reid, purporting to act as attorney for George Dennis Walsh and Amelia Sarsfield Walsh. It was then sent out to Lisbon, where George Dennis Walsh was; but he and Amelia Sarsfield Walsh disapproved of some of the terms thereof, and denied the power of Rawson H. B. Reid to execute it as their attorney, and afterwards themselves executed the settlement after having executed the two memoranda appended thereto. The deponent also made inquiries for a power of attorney authorizing Rawson H. B. Reid to execute the settlement as such attorney, but without success. The successors of the solicitors who prepared the settlement informed the deponent that the bill of costs relating to the matter was destroyed with other old papers many years ago, and that no trace of any such power could be found.

There was no further evidence of any kind as to the existence, contents, or purport of any power of attorney authorizing the execution of the deed of December 19, 1851, by Rawson H. B. Reid on behalf of Mr. and Mrs. Walsh.

Upon these facts, and in order to answer the first question raised by the summons, the Court was called upon to decide whether or not the deed of December 19, 1851, was a valid

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appointment by Amelia Sarsfield Walsh under the special power conferred upon her by the will of Margaret Morrogh.

Renshaw, Q.C., and *P. S. Stokes*, for the plaintiffs, submitted the question to the Court.

Warrington, Q.C., and *Howard Wright*, for the executors of John Moore Cole Airey.

Spence, for the official assignee in the bankruptcy of one of the next of kin. The deed of December 19, 1851, being more than thirty years old, there arises, as is said in Taylor on Evidence, s. 87, 9th ed. p. 86, "a conclusive presumption made by the law in favour of its due execution." It purports on the face of it to be executed by the duly authorized attorney of Mr. and Mrs. Walsh, and I ask the Court to presume that it was so executed in pursuance of a sufficient power of attorney duly executed by them, and accordingly took effect as an appointment by Mrs. Walsh under the power given to her by the will of Margaret Morrogh. The fact that the deed is an appointment under a special power does not, it is submitted, create any difficulty, as the execution of the deed by the attorney was a mere ministerial act not involving any delegation of the power. [Reference was also made to Farwell on Powers, 2nd ed. pp. 445, 446, and Roscoe's Law of Evidence, 16th ed. p. 34.]

P. O. Lawrence, Q.C., and *George Henderson*, for mortgagees of the share of one of the next of kin, adopted the same arguments, and further submitted that, as the signatures of G. D. Walsh and his wife appeared on the deed, the Court ought to presume that they thereby adopted or recognised the act of their attorney, and that his authority being thus shewn the production of any power of attorney was rendered unnecessary.

E. Beaumont, and *Musgrave*, for other parties.

KEKEWICH J. The rule of law which I am called upon to apply in this case may be found stated in many text-books and particularly in Taylor on Evidence (pl. 86), and Broom's Legal Maxims, and I prefer to read from a text-book rather than use my own words. In Broom's Legal Maxims the rule is thus

stated (6th ed. 1884, p. 898): "Upon the same principle proceeds the rule that deeds, wills, and other attested documents which are more than thirty years old, and are produced from an unsuspected repository, prove themselves, and the testimony of the subscribing witness may be dispensed with, although of course it is competent to the opposite party to call him to disprove the regularity of the execution." The principle to which the learned author refers is that which he cites from Co. Litt. 6 b, 332: "Omnia præsumuntur rite et solenniter esse acta." He gives another variation from Jenkins (Jenk. Cent. 185), and then he proceeds: "Antiquity of time fortifieth all titles and supposeth the best beginning the law can give them (Hob. 257)." That is the principle, and it hardly needs exposition. When a deed comes from an unsuspected repository, the Court, in the absence of evidence to the contrary, is bound to presume that, so far as the deed appears to have been executed by the parties to it, it was in fact executed by them—that is to say, executed under seal and delivered by them so as to be a complete deed. In the present case I have before me a deed, dated December 19, 1851, which comes from an unsuspected repository, and purports to be executed by several persons. [His Lordship referred to the manner in which the deed was executed, and continued:—] I must conclude that John Moore Cole Airey, Amelia Walsh, Rawson H. B. Reid, Arthur E. Campbell, and J. T. Airey properly executed the deed on the day on which it bears date. Then it also purports to be executed by George Dennis Walsh per Rawson H. B. Reid, and from that I presume that Rawson H. B. Reid did sign, seal, and deliver the deed on behalf of George Dennis Walsh, as is stated in the attestation clause. It purports likewise to have been executed by Mr. Reid as attorney for Amelia Sarsfield Walsh, and in that case also I must make the like presumption. But am I to presume anything more? It is contended that I ought to go further, and to presume that Reid was the duly authorized attorney of Mr. and Mrs. Walsh ad hoc, i.e., to exercise the power of appointment. I know of no rule which obliges me to make, or which countenances my making, any such presumption. I pronounce no opinion upon the broader

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question whether such a presumption ought to be made where the execution of the deed was a merely ministerial act. But this is the case of the execution of a special power of appointment; and it seems to me that not only am I not obliged to presume, but I ought not to presume that Rawson H. B. Reid, who purported to execute an appointment under a discretionary power, was authorized to do that on behalf of the donee of the power. So to hold would, as it seems to me, be to go far beyond the rule of law as laid down in the text-books to which I have referred, and also to disregard the rule that a person who has a discretionary power cannot delegate the execution of that power; though he may, no doubt, when once the discretion has been exercised, delegate to an attorney the execution of a deed or of any ministerial act in order to complete the appointment.

[His Lordship then dealt with the argument that by reason of the signatures of G. D. Walsh and his wife appearing on the deed of December 19, 1851, it ought to be presumed that they adopted or recognised the act of their attorney, and held that no such presumption ought to be made. His Lordship then continued :—] The result is that I must hold on the evidence before me that it is not shewn that the deed of December 19, 1851, was executed by Mrs. Walsh so as to operate as an execution of the special power conferred on her by the will of Margaret Morrogh, and it follows from this that the statutory next of kin indicated in the deed and claiming thereunder have not made out their title, and the first question asked by the summons must accordingly be answered in the negative.

Solicitors: *Crawley, Arnold & Co.; Freshfields & Williams; Field, Roscoe & Co., for J. E. Foster, Cambridge; George Coote; Wilde, Berger & Moore.*

C. C. M. D.

BLUMBERG *v.* LIFE INTERESTS AND REVERSIONARY SECURITIES CORPORATION.

KEKEWICH J.

1896

Dec. 16.

[1896 B. 4531.]

Tender—Validity—Cheque—Authority of Solicitor.

A solicitor who is authorized to accept a tender of mortgage money on behalf of his client is not at liberty to accept a banker's cheque, and tender of a cheque by the mortgagor to the solicitor is accordingly insufficient.

THE plaintiffs in this action alleged that an indenture of mortgage dated July 10, 1891, whereby certain reversionary interests belonging to the plaintiffs were mortgaged by them to the defendant corporation as security for a loan by the corporation to the plaintiffs had been improperly obtained, and claimed to have the mortgage set aside, and an injunction to restrain an intended sale by the corporation of the reversionary interests.

On November 3, 1896, the plaintiffs, on an ex parte application, obtained an order restraining the sale conditionally upon the plaintiffs paying into court 400*l.* within a short time limited by the order; but no such payment was made.

On November 5, 1896, the plaintiffs' solicitor attended at the office of the corporation's solicitor for the purpose of paying off the mortgage, and there saw the managing clerk of the corporation's solicitor, who stated that the amount due on the mortgage was 350*l.* principal, 22*l.* interest, and 33*l.* costs, in all 405*l.*, but that there was a further amount due for auctioneers' charges in respect of the sale, and, having communicated with the auctioneers through the telephone and ascertained the amount claimed by them, he stated that the total amount due was 463*l.* 7*s.* 10*d.* The plaintiffs' solicitor had with him 400*l.* cash and no more, and he therefore proposed to give his cheque on his bankers for 63*l.* 7*s.* 10*d.* to make up the amount. The managing clerk expressed himself as willing to accept the cheque, and the p'aintiffs' solicitor then placed the cash and cheque upon the table and said, "Here is your 463*l.* 7*s.* 10*d.*,

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the amount which you have asked me for, and which I pay under protest." The managing clerk refused to accept the tender under protest, saying that he should proceed to a sale that afternoon, and that the tender was bad. The plaintiffs' solicitor then left, leaving the cash and cheque upon the table. The sale was proceeded with, and Louis W. B. Nutting, who was made a co-defendant to the action, was the purchaser.

The plaintiffs now moved the Court for an injunction to restrain the defendants from completing the sale, and the question was argued whether the tender made by the plaintiffs' solicitor was sufficient, so as to justify the Court in granting the injunction asked for.

Warrington, Q.C., and *Frank Evans*, for the plaintiffs, contended that the tender was sufficient, and referred to *Greenwood* v. *Sutcliffe* (1), *Jones* v. *Arthur* (2), *Polglass* v. *Oliver* (3), and Chitty on Contracts, 13th ed. p. 672.

Renshaw, Q.C., and *Theodore Ribton*, for the defendants, the Life Interests and Reversionary Securities Corporation. It is not disputed that a tender under protest is good, nor that the managing clerk of the solicitor of the corporation had authority to accept a good and lawful tender in cash; but he had no authority to accept a cheque, and the tender was therefore bad.

E. Ford, for the defendant Nutting, the purchaser.

Warrington, Q.C., in reply. It is in the ordinary course of business of the character in question here to accept payment by cheque, and a solicitor, therefore, having authority to accept a tender, may accept the cheque of a responsible person. [He referred to *Kirton* v. *Braithwaite*. (4)]

KEKEWICH J., after dealing with other matters arising in the case, continued as follows:—Then arises a novel question, namely, whether assuming that a solicitor or any other person is authorized, either expressly or by implication, to receive a legal tender, he is authorized to accept a banker's cheque. Mr. Warrington has been careful to limit the extent of the

(1) [1892] 1 Ch. 1.
(2) (1840) 8 Dowl. 442.
(3) (1831) 2 C. & J. 15.
(4) (1836) 1 M. & W. 310.

authority, by saying that the solicitor can do what is ordinarily done in the way of business by ordinary persons in transactions of the kind in question—that is to say, he would not be at liberty to accept a diamond or other pledge, or a mortgage or other security; but that as mortgage money is generally paid by cheques, he is at liberty to accept a cheque, though Mr. Warrington will not go so far as to say that he would be at liberty to accept a bill or promissory note. It seems to me that such an extension of authority by reference to the habits of mankind would be calculated to work mischief. The acceptance of a cheque involves passing a judgment on the solvency of the person who tenders the cheque. That was what was done here. The managing clerk was prepared to take the plaintiffs' solicitor's cheque, because he knew, or thought he knew, that his cheque was good; but he had no means of satisfying himself that it was. If it had turned out that there were no funds at the bank to meet the cheque, could it have been said that there was a good tender as against the corporation? It seems to me certainly not. A solicitor who has authority to accept a tender accepts anything short of a tender in cash at his own risk. No doubt it is usual for solicitors to trust each other and to accept each other's cheques, and the practice is desirable because it promotes good feeling and facilitates business. But I think it would be going much too far to say that a solicitor has authority to accept a cheque because he has authority to accept a tender according to the law of the land. I must therefore hold that there was not in this case any sufficient tender, and that no injunction ought to be granted.

Solicitors: *Braham Barnett; H. Stanley-Jones; Surman & Quekett.*

C. C. M. D.

KEKEWICH J.

1897

Jan. 12.

BOWEN *v.* PHILLIPS.

[1896 B. 5176.]

Executor—Bankruptcy—Injunction—Jurisdiction.

The Court has jurisdiction to restrain an executor who has become bankrupt since the death of the testator from further acting as executor; and, if there is a co-executor willing to continue to act, will not require the appointment of a receiver.

Daniel Roberts, retired draper, by his will dated October 23, 1885, devised and bequeathed his real and personal estate to his wife for life, and after her death the whole to revert to his family, with the exception of 400*l.* which she was to be at liberty to dispose of as she thought best. And he appointed Daniel Phillips, accountant, and William Bowen, grocer, his executors.

The testator died on August 2, 1891, leaving his widow surviving, and the will was proved by both executors on September 15, 1891. The estate consisted of certain freehold property, mortgages, and a sum of cash deposited at a bank in the names of the executors. By arrangement between the two executors the interest on some of the mortgages was collected by Phillips, and the interest on others by Bowen. The rents of the freehold property were collected by the widow, the tenant for life, herself. Phillips improperly applied to his own use some of the interest collected by him, and failed to account to his co-executor for the same. Ultimately, on July 8, 1896, he was adjudicated bankrupt on an act of bankruptcy committed in November, 1895, and he had not yet obtained his discharge.

On December 16, 1896, Bowen, his co-executor, issued the writ in this action against Phillips, claiming an injunction to restrain him from acting further as an executor of the will, and from interfering in any way with the estate.

The plaintiff now moved for an injunction to restrain the defendant from receiving or collecting any part of the outstanding personal estate and effects of the testator, and from receiving

or collecting any part of the debts due and owing from or to the said estate, and also from receiving or collecting any part of the rents of the freehold estate of the testator, and from letting or managing the said estate, or interfering or intermeddling therewith, or with any part of the testator's estate or effects.

The defendant had not appeared to the writ, and the motion was made upon an affidavit of the service of the writ and of the notice of motion.

J. W. Greig, for the plaintiff. The Court has jurisdiction to restrain a bankrupt executor from acting: *Utterson* v. *Mair* (1); *Gladdon* v. *Stoneman* (2); *Rex* v. *Simpson* (3); Williams on Executors, 9th ed. p. 187. It seems that a receiver is usually appointed, but I submit that a receiver is unnecessary here, because there is a co-executor who can and will act alone, when the other is restrained. If the two executors are also trustees—which it would seem they are, having regard to the form of the will—it may be necessary for the plaintiff to take steps to remove the defendant as trustee and to have a new trustee appointed in his place.

KEKEWICH J. I find the jurisdiction is recognised in the current edition of Williams on Executors, and also in Seton's Forms of Judgments. I will grant an injunction in the terms of the notice of motion, until the trial or further order. A receiver is not wanted.

Solicitors: *Schultz & Son, for L. C. Thomas, Neath.*

(1) (1793) 2 Ves. 95, 98. (2) (1808) 1 Madd. 143, n.
(3) (1764) 1 W. Bl. 456, 458.

G. I. F. C.

ROMER J.
1896
Oct. 29.

DOUGLASS *v.* PINTSCH'S PATENT LIGHTING COMPANY.

[1895 D. 2001.]

Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32—*Expired Patent—Letter directed against Third Party—Threat—Injunction.*

A company owned a patent for gas buoy lanterns that had expired, and also owned patents for improvements which were still running, and had for some years supplied B. with gas buoy lanterns made under the patents. B. having given D. an order for gas buoy lanterns, which were founded to some extent on the expired patent, the managing director of the company wrote B.: "I am much surprised at this. I am afraid that this matter will lead to a great deal of difficulty and unpleasantness, and you must not be surprised if my company applies for an injunction against D. to restrain him from selling his gas buoy lanterns":—

Held, that under the circumstances the letter was a threat within the meaning of s. 32 of the Patent Act, 1883, and that D. was accordingly entitled to an injunction against the company in the terms of the section.

THIS was an action for an injunction to restrain threats under s. 32 of the Patents, Designs, and Trade Marks Act, 1883.

The defendant company had for some years prior to November, 23, 1895, in the course of their business supplied the corporation of Trinity House, and also the Lancashire and Yorkshire and London and North Western Joint Railways, with a large number of gas buoy lanterns for their harbours. These gas buoy lanterns were constructed (subject to certain improvements adopted from time to time) in accordance with an invention which was the subject of letters patent granted in 1876 to one C. D. Abel. This original patent expired in 1890; but the improvements were also the subject of several letters patent, which were still running and which were vested in the defendant company.

The plaintiff was for some years consulting engineer to the corporaton of Trinity House, but resigned that position on December 31, 1895.

In or about November, 1895, the plaintiff at the request of the said railways designed, quoted a price, and obtained an

order from them for some gas buoy lanterns for their harbour at Fleetwood. The price quoted was less than that of the defendant company, whose tender for the same order was unsuccessful. On hearing that the plaintiff's tender had been accepted, Mr. Rickman, the managing director of the defendant company, on November 23, 1895, wrote Mr. Bayley, the secretary of the Lancashire and Yorkshire Railway Company, acknowledging the receipt of his letter intimating that the plaintiff was about to construct the lanterns, and continued as follows:—

"As we have supplied hundreds of lanterns, and Mr. Douglass has, so far as I know, not made one, I am much surprised at this. I am afraid that this matter will lead to a great deal of difficulty and unpleasantness, and you must not be surprised if my company applies for an injunction against Mr. Douglass to restrain him from selling his gas buoy lanterns."

On the same day Mr. Rickman wrote a similar letter to Captain Jackson, the marine superintendent and harbour master at Fleetwood of the said joint railways, which letter contained the following passage:—

"I am very much afraid that the matter will lead to a great deal of difficulty, and some unpleasantness and ill-feeling, and you must not be surprised if this company applies for an injunction against Mr. Douglass to restrain him from selling his gas buoy lanterns."

So soon as these letters came to the knowledge of the plaintiff, he commenced this action against the defendant company, claiming an injunction to restrain them from alleging in any way that the gas buoy lanterns sold by him were constructed in infringement of any of the defendants' patents, and from threatening him with any legal proceedings for infringement in respect thereof. By his statement of claim the plaintiff alleged that by the said letters the defendants, claiming to be patentees of an invention for gas buoy lanterns, threatened him with legal proceedings in respect of the lanterns sold by him to the said railway companies; that such sale was not an infringement of any of the legal rights of the defendants; and that the said letters were written maliciously, and with the

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object of injuring him in his business, and not bonâ fide in support of any of the patent rights of the defendants.

The defendant company, by their statement of defence, denied the allegations in the statement of claim, and stated that the fact that the letters patent of 1876 had expired in 1890 was well known to the persons to whom the said letters were addressed, and that they were written bonâ fide and in the belief that the plaintiff, whilst consulting engineer to the corporation of Trinity House, had had access to certain detailed drawings of gas buoy lanterns furnished by them solely for the use of Trinity House, which were very complete and afforded a great deal of information not available to the public, and that he had improperly made use of the drawings, or copies of them, for the purpose of competing with the defendants in their business.

Issue was joined, and motion for an interim injunction was directed to stand over to the trial of the action, which now came on for hearing. The evidence is sufficiently noticed in the arguments.

Moulton, Q.C., and *A. J. Walter*, for the plaintiff. The letters are a threat within the meaning of the section. It is not necessary that the defendants should by their letters in express terms claim to be patentees. It is sufficient if the letters would have that effect on the minds of the recipients. At this time the various letters which the defendants wrote to Mr. Bayley, Captain Jackson, and others contain references to the patents under which their gas buoy lanterns were constructed, and therefore the natural inference which the parties receiving the letters of November 23 would draw would be that the defendants were claiming to be patentees of the lanterns sold by the plaintiff, and would take proceedings for infringement. The plaintiff's gas buoy lanterns are founded in part on the expired patent, which is common property, and he had no knowledge of the plans and drawings of the defendants. The letters were written maliciously and with the object to deter the recipients from giving orders to the plaintiff.

Neville, Q.C., and *Kirby*, for the defendants. We admit

that if the letters of November 23 were intended as a threat in respect of the patent rights of the defendants, they have no defence; but that is not the case. The letters on their proper construction do not involve a threat within the meaning of the section. The defendants do not expressly claim to be patentees or refer to their patents. It was well known that the patent of 1876 had expired. The letters were written in the honest belief that the plaintiff had taken advantage of his position as consulting engineer to the Trinity House and was making an improper use of the detailed plans and drawings of the defendants. It may be that we have no right of action against the plaintiff; but that is not the question. The question is whether we were acting bonâ fide. There is no evidence of malice, or that the letters were written with reference to the expired patent. The threat mentioned in the section must be a threat by a person taking up the position of a patentee. There is no reference to patents at all in the letters.

A. J. Walter in reply.

ROMER J. The conclusion I have come to, after hearing the evidence, is that the plaintiff is entitled to relief. Now it is quite true that the letter of November 23, 1895, written by Mr. Rickman on behalf of the defendant company to Captain Jackson, does not specify in terms the patents which belonged at that time to the company, or refer to any patent in particular, or set forth accurately or in terms that the letter is written on behalf of the company claiming as patentees; but I think the natural effect on any ordinary person, or customer in particular, receiving that letter would be that the threat referred to of proceedings concerned the rights of the company as patentees. It is true that Mr. Rickman in his evidence went so far as to say that he had not the company's patents in his mind when he wrote that letter; but I am reluctantly obliged to say that I distrust his memory. The conclusion I come to is this, as a matter of fact, that when he wrote that letter he had the company's patent rights in his mind, and, moreover, knew what the natural effect of that letter would be upon the person who received it. I think that he did intend in writing

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that letter to lead the person who received it to believe that the company through Mr. Rickman were claiming to be patentees of the gas buoy lanterns which the plaintiff was going to sell to the railways mentioned in the statement of claim; and I think he intended that the letter should have the effect, if possible, of stopping the proposed sale by the plaintiff, or, at any rate, hampering that sale. I also think that he had doubts in his mind whether, as a matter of fact, if it ever came to a question of absolute right in a court of law, the existing patents which the company then had—for the original patent which belonged to them had long before expired—would enable the company successfully to restrain the plaintiff from selling these lanterns as proposed by him. I think Mr. Rickman had very considerable doubts about that, and I think he did not wish, if possible, to be obliged to act up to the threat contained in that letter, at any rate on the ground of the patents. I think it had occurred to him, either when he wrote that letter or shortly afterwards, that there might be another ground on which he could stop the proposed sale by the plaintiff, namely, on the ground, though legally it was an absurd one, that, owing to the plaintiff's position with regard to Trinity House and the agreement between the Trinity House and the company, the plaintiff could in some shape or form be restrained from selling his gas buoy lanterns. But though that idea undoubtedly did occur to Mr. Rickman, I am satisfied, as I have said, that when he wrote that letter of November 23 he had the patents in his mind, and he intended the person who received it to be led to the belief that the gas buoy lanterns could not be sold by the plaintiff because they would be infringements of the company's patent rights. In other words, I come to the conclusion, as a matter of fact, that the provisions of s. 32 of the Patent Act, 1883, have been complied with so far as to entitle the plaintiff to the relief he seeks. When I say "complied with," I mean that he has established before me the facts which entitle him to relief. I think the letter of November 23 was a letter written by or on behalf of the company "claiming to be patentees" of the lanterns in question, and I think that it did threaten the plaintiff with

legal proceedings in respect of the proposed sale of the lanterns. That being so, seeing that the threats have not been with due diligence prosecuted and an action commenced, the section applies, and the plaintiff is entitled to an injunction. No substantial damage has been proved before me, and therefore I make no order as to damages. But I grant an injunction in the terms of s. 32 to restrain the defendant company, their servants and agents, from threatening the plaintiff by circular, advertisements, or otherwise with any legal proceedings or liability in respect of any manufacture, use, sale, or purchase of the gas buoy lanterns referred to in the statement of claim. And the defendants must pay the costs of the action.

Solicitors for plaintiff: *Bridger & Son.*
Solicitors for defendants: *Blyth & Co.*

H. L. F.

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Dec. 10, 11, 19.

HOBSON *v.* GORRINGE.

[1896 H. 1835.]

Trade Fixture—Hiring Agreement—Gas Engine—Mortgage of Trade Premises —Entry of Mortgagee into Possession—Right of Removal by Owner.

In determining whether or not a chattel has become a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation.

Holland v. *Hodgson*, (1872) L. R. 7 C. P. 328, explained.

Wood v. *Hewett*, (1846) 8 Q. B. 913, and *Lancaster* v. *Eve*, (1859) 5 C. B. (N.S.) 717, distinguished.

A gas engine was let out on the hire and purchase system under an agreement in writing, which provided that it should not become the property of the hirer until the payment of all the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to freehold land of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land:—

Held, that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; and consequently that it passed to the mortgagee as part of the freehold:

Held, further, that even if a licence to remove the engine could be implied from the mortgagee leaving the mortgagor in possession, the entry of the mortgagee into possession determined such licence.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713, and *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.*, [1892] 1 Ch. 415, discussed.

THIS was an appeal from a decision of Kekewich J. upon a motion to restrain the defendant from selling or disposing of to any person other than the plaintiff an 11-horse-power Stockport gas engine, erected at the South Coast Steam Saw Mills, Worthing, lately in the occupation of J. G. King, the hirer of the engine from the plaintiff. The defendant claimed as mortgagee of the saw mills to be entitled to the engine as a fixture. On the hearing of the motion, it appearing that negotiations

were pending for the sale of the mortgaged premises, a sum of 55*l.* was deposited by agreement in the joint names of the plaintiff's and defendant's solicitors, as representing the value of the engine, to abide the result of the motion, which was to be treated as the trial of the action. Kekewich J. decided that the defendant was entitled to the money. The plaintiff appealed.

The facts were as follows :—

By a contract in writing dated January 7, 1895, Hobson, thereinafter called the owner, let to King, a builder, thereinafter called the hirer, the gas engine in question upon what is known as the hire and purchase system for the purpose of being fixed upon King's land at Worthing, of which King was the owner in fee, and on which a saw mill had been erected. By clause 3 the hirer agreed to pay the owner for the hire and use of the gas engine the sum of 18*l.* before delivery, and the sum of 3*l.* 10*s.* per month after delivery for a period of ten months. Clause 4 provided that if, during the continuance of the hiring, the hirer failed to pay the hire or any part thereof the agreement should forthwith determine, and the owner should be at liberty to repossess himself of and to remove the gas engine, and the hirer should have no claim whatever against the owner, either for money he had paid for the use of the gas engine or for any damage sustained by reason of the retaking thereof. By clause 6 the owner agreed that at the expiration of ten months, if the hirer should in all things have performed his part of the agreement, the rent or hire named in clause 3 should cease, and the gas engine should become the absolute property of the hirer on the further payment of 3*l.* Clause 7 provided that the agreement should not be construed to operate in any way as a contract for the sale of the gas engine, but only as an arrangement for the hire thereof, and unless and until the hiring terminated under the provisions of clause 6 the hirer should have no right or property in the gas engine at law or in equity save as bailee thereof for hire.

This gas engine, as was known to Hobson, was required by King to drive his saw mill, and the way in which it was to be erected and was in fact erected was as follows :—In the first

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place a bed of concrete was prepared in which were embedded two iron plates, out of each of the four outside corners of which an iron bolt projected upwards in a vertical position, having a screw at its uppermost end. The base-plate of the engine was fitted with four holes, one at each outside corner, so that when the engine was placed in position upon the concrete bed the four bolts projected through the four holes in the base of the engine, and nuts were then screwed down tightly upon the tops of the bolts, and thus the engine was kept in position and prevented from rocking and shifting, as it would have done if merely placed upon the concrete foundation without the aid of the projecting bolts. There was affixed to the engine when delivered to King a plate called a "hire plate," bearing the inscription, "This engine is the property of Wilfred Hobson, 80, Queen Victoria Street, E.C."

King paid some of the monthly instalments to Hobson and then fell into arrear, and he never completed the stipulated payments so as to become the owner of the gas engine as a chattel.

By a deed of transfer and further charge dated July 24, 1895, a mortgage debt of 400*l.* secured on King's land by a deed dated March 26, 1894, was assigned to the Rev. Mr. Gorringe, and King and his mortgagee conveyed to him the land in question (together with the saw mill, engine-house, warehouses, and other building erected thereon, and the fixed machinery and fixtures) in fee simple to secure the said sum of 400*l.*, and a further advance of 200*l.*, making a total of 600*l.*, subject to the usual proviso for redemption.

On January 17, 1896, King was adjudicated a bankrupt, and in March, 1896, the mortgagee, Mr. Gorringe, entered and took possession of the mortgaged premises, together with the gas engine, which he found in its place as before mentioned.

J. Walton, Q.C., and *Curtis Price*, for the plaintiff. 1. This gas engine never became a fixture; consequently it never became part of King's freehold, and never passed to the defendant, his mortgagee. In the first place, it was never physically attached to the soil to such an extent as to make it

a fixture. Secondly, even if it was actually annexed to the soil, the intention of the parties must be regarded, and if it was not their intention that it should become a fixture, it remained a chattel notwithstanding such annexation. The test whether a thing is a fixture or not is not merely how firmly it is affixed to the soil. It depends upon intention. A thing may not be physically affixed to the soil otherwise than by its own weight, and may yet be a fixture, e.g., a door on its hinges; and, conversely, a thing may be firmly fastened to the soil and remain a chattel, e.g., the anchor of a ship. The question turns upon the object and degree of annexation as indicating the intention: *Holland* v. *Hodgson*. (1) No doubt, as was said in that case, where a thing is affixed to the soil the onus of proving that it was not the intention of the parties to make it part of the land is on those who contend that it is a chattel; but here the plaintiff is prepared to discharge that onus. The agreement which King entered into with the plaintiff is not an agreement to buy, but simply an agreement to hire. It therefore falls within *Helby* v. *Matthews* (2), and not within *Lee* v. *Butler*. (3) At the date of the mortgage to the defendant there was nothing but a hiring, which contemplated that the gas engine should be fixed and worked, but contemplated also that it should be removed. The engine does not become part of the freehold until there is a present intention to make it so; but here it was affixed to the land upon an express agreement between the owner of the land and the owner of the thing that it should not become part of the freehold. That a thing may be fastened to the soil and yet not become part of the freehold is shewn by *Lancaster* v. *Eve* (4) and *Wood* v. *Hewett*. (5) In those cases the agreement not to make the thing part of the freehold was assumed from the circumstances; but here it is express. This gas engine was affixed to the land, not for the purpose of better enjoying the land, but in order to enable the engine to be worked, and it was easily removable, and, therefore, the nature of the annexation was not such as to shew an intention to

(1) L. R. 7 C. P. 328.
(2) [1895] A. C. 471.
(3) [1893] 2 Q. B. 318.
(4) 5 C. B. (N.S.) 717.
(5) 8 Q. B. 913.

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annex the property in the engine to the property in the land: *Wake* v. *Hall.* (1) There being, then, no intention at the date of the mortgage to make the engine part of the freehold, it remained a chattel and did not pass under the mortgage.

2. Assuming the gas engine to be a fixture, the mortgagee is not entitled to it as against the owner.

A mortgagee of business premises by leaving the mortgagor in possession impliedly authorizes him to carry on his business in the usual way, and to hire and fix on the premises fixtures necessary for the business: *Gough* v. *Wood & Co.* (2) The practice of letting out gas engines on the hire and purchase system to persons employed in trade has become so notorious as to constitute a custom of which the Court will take judicial notice: *Ex parte Crossley Brothers, Limited.* (3) That case afterwards went to the House of Lords, sub nom. *McIntyre* v. *Crossley Brothers, Limited* (4); but this point was not there dealt with.

[LORD RUSSELL C.J. That was a reputed ownership case, and it is remarkable that the evidence adduced in that case should have satisfied the Court as to the existence of the custom.]

This gas engine must be assumed to have been on the mortgagor's land on the terms of the hiring agreement, with the leave and licence of the mortgagee, and that would involve the right of removal by the owner in accordance with those terms.

[LINDLEY L.J. The difficulty of applying *Gough* v. *Wood & Co.* (2) to the present case is that the engine was not put down with the licence of the mortgagee, nor was it taken up during the possession of the mortgagor.]

No doubt *Gough* v. *Wood & Co.* (2) must be taken as subject to the observations of the Lords Justices in *Huddersfield Banking Co.* v. *Henry Lister & Son* (5); but there the machinery was unfixed, not in the ordinary course of trade, but for the express purpose of defrauding the mortgagees. This case falls within the principle of *Sanders* v. *Davis* (6), where a mort-

(1) (1883) 8 App. Cas. 195, 204.
(2) [1894] 1 Q. B. 713.
(3) [1894] 1 I. R. 235.
(4) [1895] A. C. 457.
(5) [1895] 2 Ch. 273, 282, 286.
(6) (1885) 15 Q. B. D. 218.

gagor in possession let the mortgaged premises to a tenant, who brought into them certain trade fixtures, and it was held that the tenant was entitled to them as against the mortgagee on the ground that the mortgagee must be taken to have acquiesced in the tenancy. So here the plaintiff may be regarded as a quasi-tenant of the mortgagor for the purpose of placing his gas engine on his land for the term contemplated by the agreement. Assuming that the plaintiff is in the same position as a tenant of the mortgagor for a term, which is put an end to by the entry into possession by the mortgagee, it is submitted that he ought to have a reasonable time after the expiration of the term within which to exercise his right of removal. *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.* (1) is also in point. It was there laid down by North J. that a mortgagor could not confer upon his mortgagee a better title than he himself had, and the plaintiff has a perfect title against the mortgagor.

[LORD RUSSELL C.J. It is a question whether, having regard to subsequent authorities, that statement of the law is correct.]

Warrington, Q.C., and *Willoughby Williams*, for the defendant, were called upon as to the first question only. It is said that where an article is affixed to the soil in such a way that, having regard to the degree and object of the annexation, it would pass with the freehold, nevertheless, as against a subsequent mortgagee, regard is to be had to the intention of the mortgagor. The intention referred to in *Holland* v. *Hodgson* (2) is the intention to be presumed from the object of the annexation, not an intention inconsistent with the presumption arising from that object. If the plaintiff's contention were correct, *Gough* v. *Wood & Co.* (3) would have been decided on different grounds, for it could not be supposed that a nursery gardener intended trees which he had planted as part of his stock-in-trade to belong to the freehold. In that case it was expressly determined that the articles there in question were fixtures, and the decision proceeded on that footing. Here the

(1) [1892] 1 Ch. 415, 425. (2) L. R. 7 C. P. 328.
(3) [1894] 1 Q. B. 713.

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gas engine was annexed to the soil, not with a view to its own preservation, but for the purpose of turning a vacant piece of land into a valuable property. In *Wood* v. *Hewett* (1) the question at issue arose between the parties who made the agreement. In *Lancaster* v. *Eve* (2) the Court was struggling to find some form of relief against an obvious wrongdoer: that case may possibly be explained on the ground that there was a qualified possession by the plaintiff of the soil of the river, the property in which was in the Crown. There is no authority for the proposition that as against third parties you must take into account the intention of the person by whom the thing is affixed to the soil, except so far as such intention is evidenced by external facts. With regard to the construction of the agreement, this is an agreement for purchase, and not merely an agreement for hire. There is not here, as there was in *Helby* v. *Matthews* (3), any option to return the article.

J. Walton, Q.C., in reply.

Cur. adv. vult.

Dec. 19. A. L. SMITH L.J. delivered the judgment of the Court (Lord Russell of Killowen C.J., Lindley and A. L. Smith L.JJ.). He said:—This case, though small as to the amount, raises a considerable question, which is whether a mortgagee of land in fee, when he enters upon the mortgaged premises, can take possession of an engine which is attached to the soil thereof by means of bolts and screws, although the engine did not and never had belonged to the mortgagor, but to a third party.

[The Lord Justice stated the facts substantially as above set out, and continued as follows:—]

The question is whether Mr. Gorringe is entitled, under the above circumstances, to the gas engine. It is not disputed that he is entitled to the land; but the plaintiff, Mr. Hobson, denies that he is entitled to the gas engine upon the ground that it had never become King's, and had always remained a chattel belonging to him, Hobson. There can be no doubt, upon a

(1) 8 Q. B. 913. (2) 5 C. B. (N.S.) 717.
(3) [1895] A. C. 471.

mortgage in fee of the land, that, as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. If North J., in the passage in his judgment which has been referred to in *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.* (1), meant to hold otherwise, in our opinion he was in error; but we doubt if he intended so to hold. The case of *Gough* v. *Wood & Co.* (2), decided in this court, in no way assists the plaintiff, and has no application to the present case. That case was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. For additional confirmation of the ratio decidendi of this case what was said by Lindley L.J. and by Kay L.J. in the case of the *Huddersfield Banking Co.* v. *Henry Lister & Son* (3) may be referred to. Even if in the present case a licence had been granted by Gorringe to King to remove the gas engine during the continuance of a term, neither of which conditions in fact existed, Gorringe, by entering and taking possession of the land and engine, would have determined such licence.

We now come to the real point made on behalf of the plaintiff, Hobson. It is this. It is said that this gas engine never was a fixture, but always remained a chattel, and consequently never passed to Gorringe as mortgagee of the land. It obviously did not pass to him as a chattel under the mortgage to him of "fixed machinery," for, if a chattel, it ever remained Hobson's, and never was the property of King; and unless Mr. Gorringe takes the engine as part of the land mortgaged to him he does not take it at all. Now, leaving out of consideration for the present the hire and purchase agreement of January 7, 1895, there is a sequence of authorities which establish that the gas engine, affixed as it was and for the purpose for which it was to King's freehold, ceased to be a chattel and became part of the freehold. Take first of all the case of *Wiltshear* v. *Cottrell.* (4) There the Court of Queen's Bench held that a threshing machine fixed by bolts and screws to posts which

(1) [1892] 1 Ch. 425.
(2) [1894] 1 Q. B. 713.
(3) [1895] 2 Ch. 273, 282, 286.
(4) (1853) 1 E. & B. 674, 688.

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were let into the ground, and which machine could not be got out without disturbing some of the soil, would clearly pass under a conveyance of land and all fixtures. In the case of *Mather* v. *Fraser* (1), which was a case between the assignees of a mortgagor and mortgagees, Page Wood V.-C. held that the machinery fixed to the land, whether by screws, solder, or other permanent means, passed to the mortgagees. Again, in *Walmsley* v. *Milne* (2), which was a case between a mortgagor and mortgagee in fee, the Court of Common Pleas held that a steam engine and boiler and other implements secured by bolts and nuts to the walls, though they were all capable of being removed without injury either to the machinery or to the premises, were fixtures, and passed to the mortgagee as part of the freehold. In *Climie* v. *Wood* (3), which was a case between mortgagor and mortgagee in fee, the jury found that an engine and boiler which were used for sawing purposes (the engine being screwed down to planks upon the ground and the boiler being fixed in the brickwork) were trade fixtures, had been so fixed for their better use and not to improve the inheritance, and that they were removable without any appreciable damage to the freehold. The Court of Exchequer, nevertheless, held that the engine and boiler passed to the mortgagee, and this judgment was affirmed by the Court of Exchequer Chamber (4), Willes J., who delivered the judgment of the Court, stating that the reasons for a tenant with a limited interest being allowed to remove trade fixtures were not applicable to the owner of the fee. In *Longbottom* v. *Berry* (5), which was a case between assignees of a mortgagor and mortgagees, it was also held that machinery annexed to the floor of a building in a "quasi-permanent manner" by means of bolts and screws passed to the mortgagees; and in *Holland* v. *Hodgson* (6) the Exchequer Chamber affirmed *Mather* v. *Fraser* (1) and *Longbottom* v. *Berry* (5), and held that looms attached by means of nails driven through holes in the feet of the looms into the floors, which attachment was necessary to keep the looms

(1) (1856) 2 K. & J. 536.
(2) (1859) 7 C. B. (N.S.) 115.
(3) (1868) L. R. 3 Ex. 257.
(4) (1869) L. R. 4 Ex. 328.
(5) (1869) L. R. 5 Q. B. 123.
(6) L. R. 7 C. P. 328.

steady when at work, and which nails could be drawn easily and without any serious damage to the flooring, formed part of the realty, and passed to the mortgagee in fee. If there had been in this case nothing but the existing visible degree of annexation of the gas engine to King's freehold, and the known object for which such annexation had taken place, the authorities conclusively establish that the gas engine had ceased to be a chattel, and had become part of the freehold.

But it was argued that the terms of the hiring and purchase agreement caused this engine to remain a chattel, notwithstanding its annexation to the soil, for it was said that the intention of the parties who placed it where it was must be considered, and if this consideration shewed that the intention was that the chattel was not to be a fixture, though actually fixed to the freehold, it still remained a chattel. In support of this argument a passage in the judgment of Lord Blackburn (then Blackburn J.), when delivering the judgment of the Exchequer Chamber in *Holland* v. *Hodgson* (1), was quoted. That learned judge, when dealing with what were or were not fixtures, says (2): "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." The question in each case is whether the circumstances are sufficient to satisfy the onus.

It is said on behalf of the plaintiff that the hire and purchase agreement shews an intention on Mr. Hobson's part, as also on King's part, that the gas engine should remain a chattel until King had paid the stipulated instalments, which he never did. Now, if the engine had been a trade fixture, erected by King as tenant, with a limited interest, we apprehend that

(1) L. R. 7 C. P. 328. (2) L. R. 7 C. P. 335.

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when affixed to the soil, as it was, it would have become a fixture—i.e., part of the soil, and would immediately have vested in the owner of the soil, subject to the right of King to remove it during his term. "Such," says Lord Chelmsford, in *Bain* v. *Brand* (1), "is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed."

It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—i.e., part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price or for damages for the loss of the chattel is by action against King, or, he being bankrupt, by proof against his estate.

This, in our judgment, is sufficient to determine this case in

(1) (1876) 1 App. Cas. 762, 772.

favour of the defendant; but as another point has been stoutly argued on behalf of the plaintiff, we will deal with it. It is said that the intention that the gas engine was not to become a fixture might be got out of the hire and purchase agreement, and, if so, it never became a fixture and part of the soil, and it was said that the case of *Holland* v. *Hodgson* (1) had so decided. For this point it must be assumed that such intention is manifested by the hiring and purchase agreement, though, as before stated, we think it is not. Now, in *Holland* v. *Hodgson* (1), Lord Blackburn, when dealing with the "circumstances to shew intention," was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that Lord Blackburn alludes to to shew his meaning. He takes as instances (*a*) blocks of stone placed in position as a dry stone wall or stacked in a builder's yard; (*b*) a ship's anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to shew intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained, in our judgment, is not well founded.

It was further argued on behalf of the plaintiff that the cases of *Wood* v. *Hewett* (2) and of *Lancaster* v. *Eve* (3) shewed that the intention of the parties affixing a chattel to the soil must be ascertained when considering whether a chattel is or is not a fixture and part of the soil. In our opinion these cases do not shew this, and, indeed, if they did, as before stated, if the hire and purchase agreement is considered, it does not shew

(1) L. R. 7 C. P. 328. (2) 8 Q. B. 913.
(3) 5 C. B. (N.S.) 717.

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what the plaintiff says it does. In the first case (*Wood* v. *Hewett* (1)) the plaintiff, a miller, had put a movable hatch which worked up and down a groove in some immovable masonry and brickwork upon the defendant's land, and had so used it for years, the complaint against the defendant being that he had pulled up and taken away the hatch. The question was whether this movable hatch remained the plaintiff's or had become the property of the defendant. The jury found that this hatch remained the property of the plaintiff, and the Court in banco held, as we read the case, that the jury were well warranted in finding that between the plaintiff and the defendant the former had become entitled to have the hatch which was his own property standing in the soil of the defendant; in other words, that it might be inferred that the plaintiff had acquired an easement of having his hatch on the defendant's land, and could, therefore, sue for interference therewith. There was no question in that case between a mortgagee and a third party. In the second case (*Lancaster* v. *Eve* (2)) the plaintiff, who was a wharfinger, many years before the action was brought, had driven a pile into the bed of the Thames, which was the property of the Crown, for the purpose of carrying on the necessary business of his wharf, and for years and years had used this pile without interruption by any one until the defendant's barge, by reason of the negligence of the defendant's servant, ran against it and carried it away. The point taken by the defendant was that the pile had been affixed to and formed part of the bed of the river, which was not the property of the plaintiff, and that, therefore, he could maintain no action for injury thereto; but the Court held that, as between the plaintiff and the Crown, it ought to be inferred that, although the pile had been affixed in the soil of the river, yet it was so affixed by agreement between the plaintiff and the Crown that the former should have an easement over the Crown's property so as to be able to use the pile necessary for carrying on the business of the plaintiff's wharf. This is the point decided, though there are, as has been pointed out, some isolated passages as to the intention of persons when affixing a

(1) 8 Q. B. 913. (2) 5 C. B. (N.S.) 717.

chattel to the soil. That the plaintiff had a cause of action in some form or other against the defendant cannot be denied; but if the case decided, as it is argued it did, that the pile remained a chattel we do not agree with it. That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a de facto fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced. For the above reasons in our judgment the gas engine became affixed to and was part of King's freehold, and thus passed to Mr. Gorringe as mortgagee in fee of King's land.

The point made upon the hire plate on the gas engine when delivered comes to nothing, for it is no more than an indication of what the agreement was between Hobson and King, and as there is no evidence whatever that Mr. Gorringe was ever made aware of it, it cannot affect his right as mortgagee in fee of King's land.

In our judgment Kekewich J. was right when he gave judgment as he did for the defendant, and this appeal must be dismissed with costs.

Solicitors: *C. W. & H. B. Taylor; E. H. Quicke.*

H. B. H.

C. A.

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Oct. 27, 29, 30; *Nov.* 2; *Dec.* 12.

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[1894 R. 1864.]

Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 7—*Parol Evidence*—*Purchase as Trustee*—*Express Trust*—*Statutes of Limitations*—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 49—*Delay*—*Taking Accounts before Official Referee*—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 13, 14—*Rules of Supreme Court*, 1883, *Order* XXXIII., *rr.* 2, 3, 4.

Prior to 1873 the plaintiff, a married woman, was owner of certain estates in Ceylon subject to a considerable mortgage. In 1873 the mortgagees sold and conveyed the estates to the defendant, who, without the privity of the plaintiff, raised large sums by mortgage of them, and afterwards became bankrupt in 1879, and obtained his discharge in 1880. The estates were afterwards sold by the mortgagees. The plaintiff's case was that the defendant had purchased the estates as trustee for her subject to a lien for his advances. In 1880 the defendant's trustee in bankruptcy repudiated the plaintiff's title. The defendant never expressly did so, and the plaintiff never gave either of them to understand that she had given up her claim; but she took no active steps to assert it till 1894, when she commenced an action against the defendant asking for a declaration that the defendant purchased as a trustee for her, and for an account of his dealings with the property, and payment of what should be found due from him. The defendant pleaded—(1.) that the estates were conveyed to him as beneficial owner; (2.) that the trust alleged by the plaintiff was not evidenced by any writing signed by the defendant, and that the Statute of Frauds was a defence; (3.) that the plaintiff's claim, if proved, was barred (*a*) by the defendant's bankruptcy; (*b*) by the Statutes of Limitations; (*c*) by laches and delay. Kekewich J. held that no trust was proved, and dismissed the action on the first ground. The Court of Appeal, being of opinion that the evidence, which partly consisted of letters signed by the defendant, completely proved that the defendant purchased as a trustee for the plaintiff, and held the estates as such trustee subject to a lien for his expenditure:—

Held, that even if the letters signed by the defendant did not contain enough to satisfy s. 7 of the Statute of Frauds, parol evidence was admissible; and as the whole of the evidence taken together established that the defendant had purchased as a trustee, the plaintiff was entitled to a decree.

The Statute of Frauds does not prevent proof of a fraud, and it is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. Therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him.

Bartlett v. *Pickersgill*, (1759) 1 Eden 515, is inconsistent with a series of later decisions, and is not now law.

A trust thus established is an express trust within the definition given in *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, and the Statute of Limitations, therefore, is no defence to the claim; nor is the bankruptcy of the grantee, if governed by the Bankruptcy Act, 1869, a defence to an action for an account of his dealings with the estates, since by s. 49 of that Act bankruptcy does not bar the claims of a cestui que trust.

The defendant knew that land held by the defendant was claimed by the plaintiff as having been conveyed to the defendant as a trustee for her; and in the correspondence between them he never denied her title, though he never expressly admitted it. The plaintiff took no proceedings for twelve years after the correspondence between them had ceased:—

Held, that as she had done nothing actively to lead the defendant to suppose that she had given up her claim, there was nothing against her but the lapse of time; and that the mere lapse of time in a case of express trust was not a bar.

A very difficult account directed to be taken by an official referee instead of in chambers, on account of the great saving of time which would thus be effected.

THIS was an appeal by the plaintiff from a decision of Kekewich J., who dismissed the action.

The following is a brief outline of the facts of the case. In 1868 the plaintiff, Comtesse de la Rochefoucauld, was the registered owner of the Delmar estates in Ceylon, subject to a mortgage for 25,000*l.* and further advances, created by a former owner, which had become vested in a Dutch company, and to some smaller subsequent charges. The Comtesse was divorced from her first husband on July 31, 1868, and by an order of the Divorce Court he obtained an interest in the Delmar estates. The Dutch company wished to call in the mortgage, and the Comtesse not being in a position to find the money, and fearing that he might seek to obtain a transfer of the mortgage and foreclose, entered into an arrangement with a Mr. Duff and the defendant, who were anxious to help her, for them to take a transfer of the mortgage. To obviate some difficulties which arose, it was proposed that the Dutch company should sell the estates by auction, and that Mr. Duff and the defendant should enter into an agreement with the company to purchase the estates, if no higher bidder intervened, at a price sufficient to cover their mortgage debt and expenses. An agreement to this effect was signed, but Mr. Duff withdrew from it. The estates

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were ultimately put up to auction in Ceylon and sold to the defendant for 57,942*l.*, an amount sufficient to cover the debt, interest, and costs of the Dutch company. They were conveyed to him as absolute owner on May 27, 1873, and he was entered on the register.

The case of the Comtesse was that the purchase was made on her behalf, the arrangement with the Dutch company being carried on by the defendant alone after Duff's retirement, and that the defendant was a trustee for her subject to a charge in his favour in respect of all sums advanced by him in order to obtain the estates from the Dutch company, and of all sums which might be advanced by him to work the estates as coffee plantations.

After the sale had been completed the defendant managed the estates, and remitted to the Comtesse from time to time various sums—amounting in the whole to 5884*l.*—out of the profits. These payments went on till July, 1879, when the firm of which the defendant was a member went into liquidation. In May, 1880, the defendant obtained his order of discharge.

In 1876, 1877, and 1878 the defendant had, without the knowledge of the Comtesse, mortgaged different parts of the estates for large sums of money, amounting in the whole to more than 70,000*l.*

On August 9, 1880, the Comtesse by her then solicitor wrote to Mr. Cooper, the trustee of the defendant's separate estate in the bankruptcy, asserting her title to the estates. Mr. Cooper, on October 29, 1880, wrote to the solicitor, wholly repudiating the claim of the Comtesse, and asserting that the estates belonged to the defendant's creditors, the defendant, as he stated, having bought them with his own money, and mortgaged and dealt with them as his own. No further correspondence ensued, and no steps were taken by the Comtesse to assert her title.

On November 25, 1882, the defendant, in answer to a letter from the Comtesse, wrote to her as follows:—

"I have received your letter of the 16th, and deeply regret that I have nothing encouraging to report to you; and for this you will no doubt be prepared, as the continued depression in

Ceylon estates has been now common talk for the last three years.

"It is true I said in 1879 we need not despair; but I could not then foresee that the terrible blight of leaf disease would so extend throughout Ceylon as in effect to utterly destroy the coffee enterprise, and reduce the annual yield from the 50,000 tons at which it once stood to 14,000 tons estimated for the coming year.

"As regards my own affairs, nothing has been done this year by Mr. Cooper in reporting progress to the creditors for the reason that he and the committee of inspection have been engaged for some months in seeing what can be done to accomplish a favourable arrangement with two or three of the most important mortgagees.

"Unfortunately the estates have all been cultivated at a considerable loss both in 1881 and 1882, and several of them have seriously deteriorated as coffee properties." (After some further remarks as to the prospects of properties in Ceylon, he continued:—)

"When Mr. Cooper and the committee have concluded their negotiation, I presume the result will be made known at a general meeting whether favourable or unfavourable, and some new resolution arrived at for the working or abandonment of the estates. As coffee properties they have no value, and the difficulty is where is the new capital to come from to develop a new enterprise."

Again, on December 14, 1882, the defendant wrote to the Comtesse:—

"I have been compelled to delay replying to your letter of 28th ulto. owing to the absence of Mr. Cooper. There are no very recent particulars of the estates and the development of the cinchona and other cultivations. Except that the yield of the coffee trees has ceased, and that the cinchona is so much older and to that extent proportionately more valuable, I think you may consider the returns that were sent to you when a negotiation was opened with Mr. Cassel fairly represent the present position—at any rate, they should suffice to lay before any friend you may be able to interest. As the estates are

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virtually Mr. Cooper's it would save time if the negotiation for an advance were made with him. The papers I have referred to above give all particulars of mortgages and mortgage interest, and unhappily through the entire collapse of the coffee no change has been possible in respect to the liabilities."

The correspondence between the Comtesse and the defendant here practically ended. The defendant afterwards destroyed the books containing the accounts of the estates on the ground that he had no room for them; but he did not say that he did so because he considered the Comtesse to have abandoned her claim.

On December 17, 1887, the Comtesse wrote a long letter to Mr. Hollams, a member of the firm of the defendant's solicitors, in which, among other things, she asserted her title to the estates. A reply was sent on January 28, 1888, but nothing was said as to her claim of title.

On October 24, 1894, the present action was brought by the Comtesse and her daughter, who claimed an interest in the estates into the nature of which it is not necessary to enter, asking for a declaration that the defendant purchased the estates in 1873 as trustee for the plaintiffs, for an account of the defendant's dealings as trustee with the trust property, and of the balance due from him in respect thereof, and for payment of such balance. The defendant's case was—(1.) that the estates were conveyed to him, not as trustee, but as beneficial owner; (2.) that the trusts alleged were not proved by any writing signed by the defendant, and that the Statute of Frauds was a defence; (3.) that the plaintiff's claim, if proved, was barred (*a*) by the defendant's bankruptcy; (*b*) by the Statute of Limitations; (*c*) by the plaintiff's laches, and by the equitable doctrines applicable to delay independently of the statute.

The evidence as to the circumstances under which the estates were conveyed to the defendant consisted of a mass of correspondence both before and after the conveyance, and of the oral evidence of the plaintiff, the defendant, and Mr. Duff. The case was tried by Kekewich J., who held that the evidence did not shew that the defendant had purchased the estates for the benefit of the plaintiff, and dismissed the action without

entering upon the second and third branches of the defendant's case.

The plaintiff appealed. The appeal came on for hearing on October 27, 1896.

Haldane, Q.C., and *T. L. Gilmour*, for the appeal. We rely upon the correspondence as wholly inconsistent with the idea that the defendant purchased the estates on his own account. The name of the Comtesse was kept in the background that it might not come to the knowledge of her first husband that she still retained an interest in these estates. The letters written and signed by the defendant shew that there was a trust. If the oral evidence is taken in, it is established beyond doubt that the defendant purchased as a trustee for the Comtesse, subject to a lien for his expenditure, and we contend that the letters alone are enough to shew this. The defendant relies on the 7th section of the Statute of Frauds. Ceylon was not a Crown Colony when the Statute of Frauds was passed, and the statute does not apply to land there. The defendant relies on *Leroux* v. *Brown* (1) as shewing that the Statute of Frauds is a defence; but that case turned on the special wording of the 4th clause of the statute, which only defines the kind of evidence to be required by our Courts in cases falling within it. That case, moreover, has been unfavourably observed upon by the Courts. But, be that as it may, the cases have laid down from an early period that the Statute of Frauds is not to be allowed to enable a man to commit a fraud, and that it is a fraud for a man who knows that an estate was conveyed to him as trustee to deny the trust and claim the estate as his own. They, in fact, establish the principle that where it is sought to establish a trust the Statute of Frauds requires evidence in writing signed by the party to be charged where the trust arises from contract, but not where it arises from conduct: *Mestaer* v. *Gillespie* (2); *Lincoln* v. *Wright* (3); *Haigh* v. *Kaye* (4); *In re Duke of Marlborough* (5), in which last case Stirling J. goes elaborately into the authorities.

(1) (1852) 12 C. B. 801.
(2) (1805) 11 Ves. 621.
(3) (1859) 4 De G. & J. 16.
(4) (1872) L. R. 7 Ch. 469.
(5) [1894] 2 Ch. 133.

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Bartlett v. *Pickersgill* (1) must be read with reference to these later decisions.

[LINDLEY L.J. referred to *Booth* v. *Turle*. (2)]

Bartlett v. *Pickersgill* (1) is also referred to unfavourably in *Heard* v. *Pilley* (3), and the observations of Lord Selborne in *Maddison* v. *Alderson* (4) are in favour of the rule for which we contend. We say that if a signed writing is required, the defendant's letters are enough to satisfy the statute; but on the principle of all the later cases oral evidence is admissible, and the oral evidence taken with the letters proves conclusively that the defendant purchased on behalf of the plaintiff and was a trustee for her, subject to his having a lien for his expenditure. There is here an express trust within the definition given by Bowen L.J. in *Soar* v. *Ashwell*. (5) The claim, then, cannot be barred by the defendant's bankruptcy, for it took place under the Act of 1869, and by s. 49 of that Act the claims of a cestui que trust are not barred. The trust being express, the Statute of Limitations is no bar, and s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), does not apply. There can be no defence on the ground of laches or delay. The Comtesse merely delayed to sue because she was short of funds, and was afraid to embark in such a costly litigation. She never misled the defendant in any way, or gave him to understand that her claim was given up. There is nothing against her but that she forebore to sue for about twelve years after the correspondence between her and the defendant ceased. This, in a case of express trust, is no defence.

Renshaw, *Q.C.*, and *George Lawrence*, for the respondent. If the sale to the respondent was not an out and out sale, he was the holder of the legal estate with an equitable charge: *Lord Cranstown* v. *Johnston* (6); *Denton* v. *Donner*. (7) He was in the position of a mortgagee consignee, and all the correspondence agrees with this. The suit is, therefore, by mortgagor against mortgagee. Now under the Statute of Limitations as

(1) 1 Eden, 515.
(2) (1873) L. R. 16 Eq. 182.
(3) (1869) L. R. 4 Ch. 548.
(4) (1883) 8 App. Cas. 467, 475.
(5) [1893] 2 Q. B. 390.
(6) (1796) 3 Ves. 170.
(7) (1856) 23 Beav. 285.

to a mortgagee in possession a trust for sale has been held to be a mortgage for the purposes of the statute: *Locking* v. *Parker* (1); *In re Alison* (2); *Chapman* v. *Corpe*. (3) The Statute of Limitations, therefore, bars the claim.

[LINDLEY L.J. *Ward* v. *Carttar* (4) is more like the present case.]

Then as to the necessity of a trust being evidenced by writing, *Leroux* v. *Brown* (5) shews that the Statute of Frauds applies independently of the law of Ceylon. The statute has been adopted in Ceylon with modifications, and Ordinance No. 7, 1840, s. 2, is the enactment in point, and is more stringent than our law.

[LORD HALSBURY L.C. That section does not appear to affect equitable rights.]

Then under s. 7 of the statute, *Bartlett* v. *Pickersgill* (6) is an express authority in our favour. It is cited in Sugden's Vendors and Purchasers, 14th ed. 703, in terms which shew that Lord St. Leonards approved it; and it is treated in *James* v. *Smith* (7) as not having been overruled. If the appellants are entitled to an account at all, the Court will only give them mortgage accounts; but they are not entitled to any account. A mortgagee who has sold the estate and holds the proceeds of sale without any express trust can plead the Statute of Limitations after six years: *Banner* v. *Berridge*. (8) This is a thoroughly stale demand, for the title of the Comtesse was expressly denied in 1880. The defendant after 1882 destroyed the books of account of the estates as useless, and it would be inequitable to make him account now.

Haldane, Q.C., in reply, was desired by the Court to confine himself to the question of delay.

It is shewn that in 1884 the Comtesse could not get solicitors to take up the case on account of her impecunious position, and impecuniosity is an excuse for delay: *In re Cross*. (9) Coming to enforce an equitable title on the ground of trust is

(1) (1872) L. R. 8 Ch. 30.
(2) (1879) 11 Ch. D. 284.
(3) (1879) 27 W. R. 781.
(4) (1865) L. R. 1 Eq. 29.
(5) 12 C. B. 801.
(6) 1 Eden, 515.
(7) [1891] 1 Ch. 384.
(8) (1881) 18 Ch. D. 254.
(9) (1882) 20 Ch. D. 109.

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not the same thing as coming for specific performance, in which latter case the proceedings must be commenced speedily. An equitable title cannot be barred by such a lapse of time as has occurred here, unless there has been conduct on the part of the cestui que trust which makes it inequitable to enforce the claim.

[THE COURT suggested a compromise on the ground of the extreme difficulty in working out the accounts and inquiries in chambers if the plaintiffs should obtain a decree.]

Cur. adv. vult.

1896. Dec. 12. LINDLEY L.J. delivered the judgment of the Court (Lord Halsbury L.C. and Lindley and A. L. Smith L.JJ.).

The question raised by this appeal is whether the plaintiff is entitled to an account from the defendant of the proceeds of sale of certain coffee estates in Ceylon. The estates in question are known as the Delmar estates. They formerly belonged to the plaintiff; they were mortgaged first to Barings and then to a Dutch company, and on May 27, 1873, they were sold and conveyed to the defendant. In form the conveyance was to him absolutely, but the plaintiff insists that the estates were conveyed to the defendant as a trustee for the plaintiff, subject, however, to the repayment to the defendant of the amount which he paid for them and of the expenses which he has incurred in managing the estates. The estates were sold by the defendant or his mortgagees many years ago without the knowledge of the plaintiff, and she says that the proceeds of sale were more than sufficient to repay to the defendant all his advances, and that a considerable surplus remained which the defendant ought to have paid over to her. The defendant, in answer to this claim, says (1.) the estates were conveyed to him, not as a trustee for the plaintiff, but as beneficial owner; (2.) the trusts alleged by the plaintiff cannot be proved by any writing signed by the defendant, and the Statute of Frauds affords a defence to the action; (3.) the plaintiff's claim, even if proved, is barred (*a*) by the defendant's bankruptcy, (*b*) by

the Statute of Limitations, (*c*) by the plaintiff's laches, and the equitable doctrines applicable to delay independently of the statute.

Kekewich J. decided against the plaintiff on the first ground —namely, that there was no trust in favour of the plaintiff. This view of the case rendered it unnecessary for him to consider the other defences. The plaintiff has appealed from this decision; and, as we have been unable to take the same view as the learned judge of the effect of the evidence, it will be necessary for us to deal with all the other defences relied upon by the defendant.

The circumstances under which the Delmar estates were conveyed to the defendant are to be gathered from the verbal testimony of the plaintiff, the defendant, and Mr. Duff, and a mass of correspondence both before and after the conveyance. The correspondence after the conveyance is relied upon by the plaintiff as being inconsistent with the defendant's contention that he acquired the estates for himself beneficially, free from any trust in favour of the plaintiff. [The Court here stated the leading facts in the history of the case, and then proceeded to examine the correspondence, and adverted to the remittances made by the defendant to the Comtesse between May, 1873, and July, 1879, and to the defendant's letters to her during that period, and summed up as follows:—]

We come, therefore, to the conclusion that the plaintiff has proved that the estates in question were conveyed to the defendant on May 27, 1873, upon trust for her, but subject to a charge in his favour in respect of all sums advanced by him in order to obtain the estates from the Dutch company in the first instance, and of all sums advanced by him in order to work them as coffee plantations after he had acquired them.

This conclusion renders it necessary to consider whether the Statute of Frauds affords a defence to the plaintiff's claim. The section relied upon is s. 7, which has been judicially interpreted in *Forster* v. *Hale* (1) and *Smith* v. *Matthews*. (2) According to these authorities, it is necessary to prove by some

(1) (1798) 3 Ves. 696. (2) (1861) 3 D. F. & J. 139.

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writing or writings signed by the defendant, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial. It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself. This doctrine was not established until some time after the statute was passed. In *Bartlett* v. *Pickersgill* (1) the trust was proved, and the defendant, who denied it, was tried for perjury and convicted, and yet it was held that the statute prevented the Court from affording relief to the plaintiff. But this case cannot be regarded as law at the present day. The case was referred to in *James* v. *Smith* (2), and was treated as still law by Kekewich J.; but his attention does not appear to have been called to *Booth* v. *Turle* (3), nor to *Davies* v. *Otty* (No. 2) (4), both of which are quite opposed to *Bartlett* v. *Pickersgill.* (1) So is *Haigh* v. *Kaye.* (5) The late Giffard L.J., one of the best lawyers of modern times, speaking of *Bartlett* v. *Pickersgill* (1), said: "It seems to be inconsistent with all the authorities of this Court which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud": see *Heard* v. *Pilley.* (6) The case not only seems to be, but is, inconsistent with all modern decisions on the subject. See, in addition to those already mentioned, *Lincoln* v.

(1) 1 Eden, 515.
(2) [1891] 1 Ch. 384.
(3) L. R. 16 Eq. 182.
(4) (1865) 35 Beav. 208.
(5) L. R. 7 Ch. 469.
(6) L. R. 4 Ch. 548, 553.

Wright (1), where a conveyance absolute in form was held to be a mortgage only. See also *In re Duke of Marlborough* (2), in which Stirling J. examined the authorities, and held that an assignment absolute in form was subject to a trust for the plaintiff.

The defence, based on the Statute of Frauds, is met by the plaintiff in two ways. First, she says that the documents signed by the defendant prove the existence of the trust alleged; secondly, she says that if those documents do not prove what the trust is with sufficient fulness and precision, the case is one of fraud which lets in other evidence, and that with the aid of other evidence the plaintiff's case is established. In our opinion the plaintiff is correct in this contention. We are by no means satisfied that the letters signed by the defendant do not contain enough to satisfy the Statute of Frauds. Whether this is so or not, the other evidence is admissible in order to prevent the statute from being used in order to commit a fraud; and such other evidence proves the plaintiff's case completely.

Counsel for the plaintiff contended that the Statute of Frauds had no application to lands in Ceylon. But, having regard to *Leroux* v. *Brown* (3), and to the language of s. 7 of the Statute of Frauds, we are unable to see why the defendant should not be able to rely on that statute as a defence to any proceedings in this country having for their object the proof and enforcing of a trust, even of lands abroad. The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries. If, therefore, the statute afforded the defendant a defence, he would be entitled to the benefit of it. But, for the reasons above given, the statute affords him no protection.

Having come to the conclusion that the plaintiff has proved her case by evidence admissible by our law, it is necessary to consider the other defences raised. The first is bankruptcy.

(1) 4 De G. & J. 16. (2) [1894] 2 Ch. 133.
(3) 12 C. B. 801.

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The defendant became bankrupt in 1879, and he obtained his discharge in May, 1880. The Bankruptcy Act then in force was the Act of 1869, and by s. 49 of that Act bankrupt trustees were not discharged from the claims of their cestuis que trust. This defence, therefore, fails.

The next defence is the Statute of Limitations. The trust which the plaintiff has established is clearly an express trust within the meaning of that expression as explained in *Soar* v. *Ashwell.* (1) The trust is one which both plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises although there may have been no intention to create a trust. The intention to create a trust existed from the first. The defendant is not able in this case to claim the benefit of s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), and the statute which is applicable is the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 2, which enacts as follows: "No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." The Statutes of Limitations, therefore, afford no defence if the plaintiff's action is to be regarded as one brought by a cestui que trust against his trustee seeking for an account of trust property. It was, however, urged by the defendant's counsel that this action was really one for an account by a mortgagor against a mortgagee in possession, and that so regarded one of the Statutes of Limitations was a bar to it. In support of this contention counsel cited *Locking* v. *Parker* (2); *In re Alison.* (3) These cases undoubtedly shew that a conveyance upon trust for sale to secure a sum advanced is regarded as a mortgage, and that although there may be a trust declared of the surplus in favour of the mortgagor the Statute of Limitations is a bar to an action brought by him for the surplus if his title to the land is barred before a sale by the mortgagee. The ground of these decisions is that the trusts were such that the mortgagor could not enforce them and compel a sale, but could only redeem. Those cases, however, shew that the mortgagor

(1) [1893] 2 Q. B. 390. (2) L. R. 8 Ch. 30.
(3) 11 Ch. D. 284.

can as cestui que trust enforce the trust of the surplus after a sale if his title to the land is not barred before the sale takes place, as it was in *In re Alison.* (1) *Banner* v. *Berridge* (2), which was also cited to support the view we are considering, merely shews that a mortgagee selling under a power of sale is not an express trustee of the surplus for the mortgagor in the absence of words creating a trust for him. The mortgagee in that case was a mortgagee of a ship, and he sold as such under his statutory power. The real transactions in those cases were mortgages, and were very different from the real transaction in this case. The real transaction here was a purchase by the defendant for the plaintiff; she claims relief, not as mortgagor, but as the defendant's cestui que trust, although she admits his lien on the property for his advances; she claims an account of his dealings and transactions with her property, and in particular an account of the money which he has obtained from it. This being the real nature of her claim, the cases to which we have alluded are not applicable to it, and the Statutes of Limitations are no bar to the action.

We come now to the last ground of defence—namely, laches and lapse of time apart from the Statutes of Limitations. This is the most difficult part of the case. The time which has elapsed since the plaintiff knew that her claim to the estate was disputed is so considerable that, before giving the plaintiff the relief to which she would otherwise be entitled, it is necessary to consider what her conduct has been, and whether anything has happened to render it unjust to the defendant to compel him to account now. On January 7, 1880, Mr. Saboniere wrote a letter to the plaintiff and told her that the estates belonged to the defendant's creditors. On August 9, 1880, the plaintiff, by her then solicitor, Mr. Lake, wrote to Mr. Cooper, the defendant's trustee in bankruptcy, claiming the estates as her own. On October 29, 1880, Mr. Cooper wrote to Mr. Lake and disputed this claim, and asserted the right of the defendant's creditors to the estates, stating that the defendant had bought them with his own money, and had mortgaged them and dealt with them as his own. It is to be inferred from another letter

(1) 11 Ch. D. 284. (2) 18 Ch. D. 254.

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of Lake's, dated October 30, 1880, that he communicated the position of affairs to the plaintiff, and explained to her the necessity of making up her mind whether she would or would not embark in a very serious and expensive litigation with the defendant's trustee in bankruptcy. It is also to be inferred from her subsequent letters that she preferred not to do so, but to wait and see whether the defendant would not be able to make some arrangement with his creditors which would enable him to regain control over the estates, and then recognise her claims to them. She was unquestionably encouraged to do this by the defendant himself. See his letters of November 25 and December 14, 1882. The estates had not then been sold, but were still being carried on. We can find nothing since 1882 which was in any way calculated to induce the plaintiff to believe that her claims would ever be recognised. On the other hand, the defendant, as distinguished from his trustee in bankruptcy, never repudiated them. This suit was not instituted until October 24, 1894, twelve years after the correspondence between the plaintiff and the defendant practically ceased. The principle applicable to cases in which equitable relief is sought after long delay is well expressed in Lord Blackburn's judgment in *Erlanger* v. *New Sombrero Phosphate Co.* (1): "In *Lindsay Petroleum Co.* v. *Hurd* (2) it is said: 'The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the

(1) (1878) 3 App. Cas. 1218, 1279. (2) (1874) L. R. 5 P. C. 221, 239.

length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.'" Lord Blackburn goes on to say: "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry." In questions of this kind it is not only time, but the conduct of the parties which has to be considered. Before 1882 the defendant had mortgaged the estates as if they were his own, but he concealed such mortgages from the plaintiff. Since 1882 the estates have been sold, and he has received the moneys arising from their sale, but he concealed these transactions from the plaintiff. The defendant also destroyed the books containing the accounts of these estates. He says he did this not because the plaintiff abandoned her claims, but because he had no room for the books. Under these circumstances he can hardly invoke the loss of the books as a reason for refusing relief to the plaintiff. But, as already stated, since 1882 the defendant has done nothing to induce the plaintiff not to sue him, nor to lead her to believe that any claim by her would be recognised. On the other hand, the plaintiff has done nothing actively to lead the defendant to suppose that she abandoned any claim she might have against him as her trustee. There is nothing to be said against her except that she has forborne to sue for twelve years. In 1887 she wrote a letter to Mr. Hollams asserting her rights, but she did no more. Under these circumstances, to hold that time is a bar to the plaintiff's claim would be to decide that, although the Statute of Limitations is no bar to a suit by a cestui que trust against a trustee in a case of express trust, yet that lapse of time without

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more is a bar. Such a conclusion cannot be correct, and it was decided to be inadmissible in *In re Cross*. (1) Even where there is an express trust, lapse of time, coupled with other circumstances which render it unjust to give the plaintiff relief against the defendant, will induce the Court to refuse the relief, although no Statute of Limitations might bar his claim: see *Bright* v. *Legerton* (2) and *In re Cross*. (1) But in this case, which is one of express trust, there is nothing except time, and that without more is not sufficient apart from some Statute of Limitations. This view of the case renders it unnecessary to examine the excuses given by the plaintiff for not instituting proceedings sooner. The appeal must be allowed and the judgment be reversed. It must be declared that the defendant purchased the Delmar estates as a trustee for the plaintiff, but subject to a charge for the amount paid to the Dutch company. An account must then be directed of the defendant's dealings and transactions with the Delmar estates. The account will be an account as between a trustee and his cestui que trust, not an account as between mortgagor and mortgagee, and there must be no account on the footing of wilful default. The defendant must be allowed all his advances and outlays, with colonial interest; but he ought only to be charged simple interest at 4 per cent. on balances in his hands, unless it appears that he has made more. Minutes had better be prepared and signed, and, if necessary, they can be mentioned to the Court. The defendant must pay the costs of the action up to the hearing and the costs of the appeal.

Gilmour, for the defendant, asked that the costs might be taxed on the higher scale.

LINDLEY L.J. We have power to make such an order, but it is a power which ought only to be exercised under very special circumstances. There is no ground for exercising it here.

Gilmour then asked that the accounts might be taken by an official referee instead of in chambers. He referred to the

(1) 20 Ch. D. 109. (2) (1861) 2 D. F. & J. 606.

Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 13, 14, and Order XXXIII., rr. 2, 3, 4, as giving power to order this, and urged that there would be a great saving of time, as an official referee took a case continuously, whereas the chief clerks could only give appointments at distant intervals.

Renshaw, Q.C., doubted whether in a case of this nature an official referee would be able to proceed continuously, but he did not strongly oppose.

LINDLEY L.J. This is eminently a case for an official referee, and sending it to him will cause a great saving of time.

THE COURT accordingly directed that the case should go to an official referee.

Solicitor for appellant: *G. H. C. Lea.*
Solicitors for respondent: *Hollams, Sons, Coward & Hawksley.*

H. C. J.

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[1877 M. 123.]

Principal and Agent—Fund in Court—Payment out to wrong Person—Fraud — Solicitor — Use of Name by uncertificated Solicitor—Ratification — Solicitor Partner—Liability—Commissioners of Treasury—Replacement of Lost Fund—Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict. c.* 44), *s.* 5—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 10—*Form of Order.*

Where negligence or other breach of duty is committed by a solicitor in a matter of which the Court has seizin, the Court can summarily order the solicitor, as its officer, to make good the loss actually occasioned thereby, but cannot mulct him in damages for his misconduct.

To constitute a binding adoption or ratification of acts done without previous authority, (1.) the acts must have been done for, and in the name of, the supposed principal; and (2.) full knowledge of them, and unequivocal adoption after knowledge, must be proved; or else, the circumstances must warrant the clear inference that the principal was adopting the acts of his supposed agent whatever their nature or culpability.

Without the knowledge or authority of X., a solicitor, A. B., another solicitor, used X.'s name in proceedings, wherein by acts of fraud and forgery, A. B. obtained an order for the payment out of a fund in court,

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and was thereby enabled to get the fund paid out by a cheque from the Paymaster-General, with which he opened a fictitious account at a bank. Two days later, and after the account had been partially drawn upon, X. was told by A. B. that his name had been made use of for a formal party. X. reprimanded A. B. for this, but, without inquiring into the nature of the business, accompanied A. B. to the Paymaster-General's Office, and received a cheque for 15*l.* for costs; over 10*l.* of this he paid to A. B. for out of pocket expenses, and the balance of 4*l.* 5*s.* 6*d.* he handed to his partner Y., who entered it to the credit of the firm in their books without knowing anything of the circumstances under which the money had been paid.

A large portion of the fund formerly in court having been lost:—

Held, (1.) that, even if X. had previously authorized the use of his name for a formal party, he would not have been responsible for the acts of fraud and forgery committed by his supposed agent for that agent's own fraudulent purposes; (2.) that, under the circumstances, X. had not condoned or ratified the use of his name by A. B., and was not liable for the whole of the loss sustained, but only for the amount of the 15*l.* cheque which he took; and (3.) that Y. was liable only for the 4*l.* 5*s.* 6*d.* received by him for the partnership.

Form of order for making good a loss occasioned to the Consolidated Fund under the Court of Chancery (Funds) Act, 1872, s. 5, through payment of a fund out of court to the wrong person.

The order of Kekewich J. varied.

APPEAL from Kekewich J.

The question on this appeal was whether Messrs. John Clear and James Ernest Green, of 1, Old Sergeants' Inn, who were in partnership, as solicitors, under the firm of Clear & Green, were, or whether either of them was, liable to make good, all or any and what part of a sum of 6387*l.* 0*s.* 2*d.*, the proceeds of a fund formerly standing to the credit of this action, and paid out of court pursuant to an order dated July 13, 1895, which order had been procured by the fraud of one John Arthur Hales, a solicitor falsely representing himself as practising at 15, Clifford's Inn.

Hales was an undischarged bankrupt and an uncertificated solicitor. The former fact was known to Clear; the latter was not. Hales was also a commissioner for taking affidavits, and had been in that character brought into connection with Clear; but Green did not know him at all.

The material facts of the case were as follows:—

Under a settlement dated July 9, 1858, certain property was

vested in trustees upon trust for Jacob Moses (who subsequently changed his name to John Moses Marsh) during his life, with reversion to such one or more of his children as he should appoint, and in default of appointment for all his children in equal shares.

In 1877 this action was brought for the carrying into execution of the trusts of the settlement, and in the same year the usual judgment was pronounced therein. In 1882 the property comprised in the settlement was sold, and the proceeds were paid into court to the general credit of the action, and invested in 3½ per cent. India Stock. J. A. Hales acted as solicitor for the plaintiffs in the action.

In 1892 John Moses Marsh died, leaving Joseph Moses Marsh, his eldest son, and several other children.

On March 25, 1895, Mr. Clear, who had previously carried on business alone, entered into partnership with Mr. Green, and since that time they had carried on their business under the name of "Clear & Green" at No. 1, Old Serjeants' Inn. Clear had then known Hales for about five years, but had had no business transactions with him beyond occasionally requiring his services as a commissioner as above mentioned. About the beginning of January, 1895, Clear had, at Hales' request, accompanied him to the Paymaster-General's Office, and had there identified him, without being told for what particular business the identification was required. Clear did not see Hales again till July, 1895, when Hales called on him at his office and said, "I have some business, and I want another solicitor to act for one of the formal parties: will you act for me?" To which Clear replied, "We shall be very happy on receiving instructions." Whereupon Hales rejoined, "Of course"; but no name of any business or person was mentioned, and Hales did not ask for leave to make use of Clear's name or that of his firm. Nothing more was heard from Hales until Monday, August 12, 1895.

In the meantime, towards the end of June, 1895, a petition was presented to the Court by Hales in the name of "Joseph Moses Marsh," which, after reciting the settlement of 1858, that Joseph Moses Marsh had been certified by the chief clerk

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in the suit of *Marsh* v. *Joseph* to be the eldest son of John Moses Marsh (formerly Jacob Moses), and that certain appointments of new trustees under the settlement of 1858 had been made, proceeded to state that by deed-poll of December 31, 1894, John Moses Marsh, under his power of appointment and subject to his own life interest, had irrevocably appointed the sum then in court standing to the credit of the action of *Marsh* v. *Joseph* to his son, Joseph Moses Marsh, absolutely for his own benefit.

The petition further stated the death of John Moses Marsh, and then prayed that the whole of the fund then in court to the general credit of the action, amounting to 5448*l.* 14*s.* 9*d.* India 3½ per cent. Stock, might be sold, and that the proceeds, after payment of the costs of the petitioner and respondents (to be taxed in case the parties differed) and after payment of duty, might be paid out to the petitioner, "Joseph Moses Marsh."

The petition bore the names of "John Clear & Co., Serjeants' Inn," as solicitors for the petitioner. There was, however, no firm practising under that name. The respondents to the petition were the trustees of the settlement of 1858, and certain of the persons interested under the settlement in default of appointment, namely, the trustees of the marriage settlement of Mrs. Dutch, one of the daughters of John Moses Marsh—which trustees had obtained a stop-order on the fund—and Louis Frederick Moses Marsh (a younger son of John Moses Marsh), who had also obtained a stop-order.

The evidence in support of the petition consisted only of one affidavit, which purported to be made by the petitioner "Joseph Moses Marsh." This affidavit, which was indorsed "John Clear & Co., Serjeants' Inn," exhibited (amongst other documents) the alleged deed-poll of December 31, 1894, but did not purport to prove the actual execution thereof. For the purposes of the hearing, Hales, again using the name of "John Clear & Co.," instructed one counsel to appear in support of the petition, and, in the name of "J. Hales," instructed another counsel to appear for all the respondents and to consent to the prayer of the petition.

The petition accordingly came on before the Court as unopposed on July 13, 1895, separate counsel appearing for the petitioner and the respondents, and an order was made which, as drawn up, directed that the stock should be sold, that out of the proceeds 15*l.*, the agreed costs of the petitioner, should be paid to "Mr. John Clear, of Serjeants' Inn, E.C., his solicitor," and 10*l.*, the agreed costs of the respondents, should be paid to "Mr. John Hales, of 15, Clifford's Inn, E.C., their solicitor"; that 224*l.* 11*s.* 5*d.* should be paid in respect of the estate duty, and that the balance should be paid out to the petitioner.

The petition and affidavit were prepared, counsel instructed, and the proceedings conducted throughout, by Hales alone, entirely without the knowledge of the real Joseph Moses Marsh, or of any other of the parties interested in the fund in court, and neither Mr. Clear nor Mr. Green had, at the time, any knowledge whatever of the proceedings.

In pursuance of the order so obtained, the stock in court was sold on August 6, 1895, and on Saturday, August 10, three cheques were drawn in the Paymaster-General's Office, upon the Bank of England, one payable to "Joseph Moses Marsh or order" for 6137*l.* 8*s.* 9*d.*, one payable to "John Clear" for 15*l.*, and one payable to "John Hales" for 10*l.* These cheques, with the provision for the estate duty, exhausted the fund in court. On the same day Hales presented himself at the office of the Paymaster-General with a person whom he identified as his "client," the petitioner "Joseph Moses Marsh," and who as such received the cheque for 6137*l.* 8*s.* 9*d.* Hales, with his "client," then went straight from the Paymaster-General's office to Child's Bank, and introduced the "client" to one of the partners as "Joseph Moses Marsh," Hales having been a former customer of the bank. The "client" then signed the customers' book as "Joseph Moses Marsh." An account was at once opened in that name, and the cheque for 6137*l.* 8*s.* 9*d.*, indorsed with the name of the payee, was paid in to the credit of that account, and was credited as cash. On the same day, also, two cheques drawn in the name of "Joseph Moses

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Marsh" upon the same account, one for 100*l.* to "Self," and the other for 1*l.* 8*s.* 1*d.* to "J. A. Hales," were cashed.

On Monday, August 12, 1895, about or shortly before one o'clock, Hales called at the office of Clear & Green and saw Mr. Clear. According to Mr. Clear's evidence in the present proceedings, Hales reminded Mr. Clear of his having spoken to him about some business that he was going to bring to Clear & Green. He said, "It's all done. I did it for you. I did not want to bother you. The cheque is waiting for your costs at the Paymaster-General's." Mr. Clear thereupon reprimanded him and asked him what business he had to use his name or the name of the firm. To which Hales replied, "I thought it was such a simple matter that it was not worth while. I thought I could carry it out and instructed counsel, and I have done everything necessary—there was a good man," naming the learned counsel who had appeared for the supposed petitioner. To this Mr. Clear replied that he liked to know what was going on, that he did not like people to use his or his firm's name, and that he had never allowed this on any occasion.

Mr. Clear in his evidence further stated that he did not inquire, nor did Hales tell him, what was the nature of the business in which his name or that of his firm had been used, and that he did not ascertain till a much later period that his name or that of his firm had been used for a petitioner who was seeking payment of money out of court. Ultimately, Mr. Clear went with Hales to the Paymaster-General's Office and there received the cheque for 15*l.* for his agreed costs, which he forthwith cashed. The cheque was headed with the title of the ledger credit, "*Marsh* v. *Joseph*," and out of the proceeds Mr. Clear repaid to Hales 10*l.* 14*s.* 6*d.*, which the latter said represented payments by him to counsel, and handed the balance, 4*l.* 5*s.* 6*d.* in cash, to his partner, Mr. Green, who kept the books of the firm, and Mr. Green on the same day entered it thus in the cash-book of the firm: "Received cash of J. Hales, *re* Joseph, 4*l.* 5*s.* 6*d.*" That was the sole connection of Mr. Green with the matter. Mr. Clear further stated that he had had no reason to suspect Hales, and had always

looked upon him as an upright man; that he did not particularly notice the title of the ledger credit on the 15*l.* cheque; that he had never heard the names of the parties to the action, nor the name of the action, nor the name of the judge to whom the action was assigned, and never instructed counsel to appear on the petition; that he was not in court when it was disposed of, and knew nothing about it; and that he first heard of the matter in October, 1895, when Messrs. Mear & Fowler, the solicitors to the present petitioners, called on him and informed him of the fraud. In the course of his cross-examination in the present proceedings Mr. Clear stated that he did not at the time know what the title "*Marsh* v. *Joseph*" on the 15*l.* cheque meant, and made no inquiry, thinking that the whole thing was over, as Hales told him so. It was true that on August 12 he was told that his name had been used, but as the thing was over he thought he might take the cheque. He thought it a great liberty on Hales's part to use his name, but he did not see any harm in it. He told Hales that he supposed he must treat him, Hales, as his clerk in the matter. He did not see any occasion for telling the Paymaster-General that his name had been used without authority, nor did he think it a serious matter that his name had been so used, knowing Hales, and believing, as he did, that he was an upright man. About July Hales asked him whom he generally employed as junior counsel; witness gave him the name, and he supposed that was how it came about that the counsel he had named to Hales appeared for the respondents on the fraudulent petition; but Hales, in asking for the name of witness's counsel, never mentioned any particular cause or matter.

Mr. Green in his evidence stated that he knew nothing about the matter beyond the fact that about August 12 Mr. Clear handed him a sum of 4*l.* 5*s.* 6*d.* in cash, saying that it came "from Hales, *re* Joseph." Witness did not know what that meant, but understood it related to some business his partner had done. He paid the cash into the bank to the partnership account, and entered the payment in the partnership books. He knew nothing about Hales, and first heard of the fraud in October, 1895.

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On the same Monday, August 12, between one and two o'clock, a cheque, dated August 10, for 4000*l.* payable to "Self," and drawn in the name of "Joseph Moses Marsh" on the account at Child's bank, was cashed by that bank; on August 13 a further sum of 50*l.* was drawn out by a cheque dated August 12, also signed "Joseph Moses Marsh"; and on September 14 a further sum of 20*l.* was drawn out by a cheque signed in the same way, the total drawings in the name of "Joseph Moses Marsh," including the 100*l.* and 1*l.* 8*s.* 1*d.* drawn out on August 10, amounting to 4171*l.* 8*s.* 1*d.* There then remained to the credit of the account at Child's Bank a balance of 1966*l.* 0*s.* 8*d.*, and that balance so remained up to the discovery of the fraud.

The fraud was discovered on October 15, 1895, when the solicitors to some of the real parties to the action, on calling at the Paymaster-General's Office to obtain a certificate as to the amount of the fund in court in the action, were informed that the fund had already been paid out, the cheque for the same cleared at Child's Bank, and the account in the action closed. Thereupon, on the same day, an injunction was obtained to restrain Child's Bank from parting with the balance of 1966*l.* 0*s.* 8*d.* then remaining in their books, and under an order dated October 24, 1895, the bank paid that sum into court to the credit of the action, "Balance of moneys in the hands of Messrs. Child & Co. in the name of Joseph Moses Marsh."

Early in February, 1896, Hales was convicted at the Central Criminal Court, on his own confession, of having forged the indorsement on the cheque obtained from the Paymaster-General, and he was eventually sentenced to five years' penal servitude.

In consequence of the fraud by Hales, this petition was presented in the action by the trustees of the marriage settlement of Mrs. Dutch, asking that the order of July 13, 1895, might be discharged, and that the Paymaster-General, or the Commissioners of Her Majesty's Treasury, might be directed to replace to the credit of the action the original fund of 5448*l.* 14*s.* 9*d.* India 3½ per cent. stock, together with all dividends which had

accrued due thereon since July 13, 1895, and for certain inquiries as to the issue of John Moses Marsh, and for other consequential relief.

Upon the petition coming on for hearing before Kekewich J. on February 20, 1896, it was not disputed that, if the order of July 13, 1895, were discharged and a new order made for distribution of the fund as if it were still in court, the Treasury, having regard to the provisions of the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), s. 5, would have to replace the fund. It was, however, alleged on behalf of the Treasury that the erroneous payment of the money out of court had been caused or facilitated by the negligence of Mr. Clear and his partner Mr. Green; and it was, therefore, contended that they were liable, as officers of the Court, to make good the loss sustained. As the result of a communication which had been made by Kekewich J. to the Incorporated Law Society, Messrs. Clear & Green attended at the hearing of the petition to explain to the Court their connection with the matter. After hearing their explanations, the further hearing of the petition was, at his Lordship's suggestion, adjourned in order that both gentlemen might be represented by counsel, and, if required, give evidence on oath. On February 26, 1896, the petition again came on for hearing, both Mr. Clear and Mr. Green appearing separately by counsel. They then went into the witness-box and gave their evidence on oath to the effect stated above. Evidence was also given by the counsel who appeared for the respondents to the fraudulent petition, and by one of the acting partners in Child's Bank.

Hastings, Q.C., and *Stewart-Smith*, for the petitioners. The jurisdiction of the Court to make an order on this petition is derived under s. 5 of the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), which enacts that the Consolidated Fund shall be liable for any default of the Paymaster-General, however arising: and where an order for payment out of money in court has been obtained by fraud, the proper course is to discharge that order, and then make an order for distribution just as if the fund were in court, no actual order being made

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on the Commissioners of the Treasury to replace the fund: *Slater* v. *Slater* (February 4, 1888). (1) But since the effect

(1) Kay J.

Jan 21; Feb. 4, 1888.

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[1864 S. 168.]

PETITION.

In this action, which was for the administration of a testator's estate, a fund representing a share of the testator's residuary estate which had been bequeathed upon trust for such of the children of his daughter, Rose Mabel Maxwell, as should attain twenty-one or marry, was carried over to "the account of the issue or children of Rose Mabel Maxwell deceased." Rose Mabel Maxwell died, leaving an only daughter, the petitioner Rose Maud Maxwell, a spinster, who attained twenty-one in December, 1886.

Previously to January 28, 1884, there were standing to the credit of the account two sums of 4387*l.* 10*s.* 3*d.* Consols, and 195*l.* 19*s.* 4*d.* cash. W. Bowden, Chancery managing clerk to a firm of solicitors whose clients had the conduct of the action, had acquired knowledge of the existence of the fund and the nature of the petitioner's title. By falsely representing that he was authorized by the petitioner to act for her and to retain a solicitor on her behalf, he induced John Francis Lidiard, who was a solicitor, to act as the petitioner's solicitor for the purpose of obtaining payment of the fund. Bowden afterwards produced a forged affidavit purporting to shew that the petitioner had attained her majority. Upon a summons in chambers, and upon production of the forged affidavit, an order was obtained from the chief clerk on January 28, 1884, whereby it was ordered (inter alia) that the sum of 4387*l.* 10*s.* 3*d.* Consols in court to the credit above mentioned should be sold, and that the money to arise by such sale, and the sum of 195*l.* 19*s.* 4*d.* cash in court to the same credit, should be paid to the petitioner, who in fact was then under age. Lidiard, as solicitor, and on behalf of the petitioner, obtained the usual form of power of attorney from the Paymaster-General, which he handed to Bowden, who subsequently returned the same to Lidiard, purporting to be duly executed by the petitioner in favour of Lidiard. It was in fact forged, but payment of the fund was, upon production of it, obtained by Lidiard, and he, after deducting for himself the half of one-sixth of the fund (which it was represented by Bowden that the petitioner had agreed to allow for recovery of the fund) and other expenses, handed the residue to Bowden upon production by Bowden of a forged authority, purporting to be signed by the petitioner and empowering Bowden to receive the money. Lidiard never had any personal communication with the petitioner. Bowden subsequently absconded. The petitioner was entirely ignorant of the proceedings, and had never in any way authorized the use of her name in reference to the fund. Having attained twenty-one and become aware of what had occurred, she presented a petition to the Lord Chancellor, under s. 5 of the Court of Chancery (Funds) Act, 1872, for a certificate under that section in order that the fund might be replaced out of the Consolidated Fund. Upon the hearing of such petition on December 14, 1887, counsel for the Treasury contended that the application was premature, and that the certificate should not go until the petitioner had

of such an order is that the Commissioners of the Treasury have to replace the fund, they should, as being the parties in default, be ordered to pay the costs of this petition.

herself obtained a proper order from the Court for payment out of the fund to her, and the Paymaster-General had failed to comply with such order, and by arrangement the application to the Lord Chancellor stood over in order that the petitioner might apply to the Court for an order for payment out.

This petition was accordingly presented in the action, asking that the order of January 28, 1884, might be discharged, and that notwithstanding that order the Paymaster-General might be ordered to transfer and pay to the petitioner 4387*l.* 10*s.* 3*d.* Consols and 195*l.* 19*s.* 4*d.* cash, and such further sum as was equivalent to the dividends and interest which would have accrued on the fund if it had not been paid out under the order of January 28, 1884. The petition was, by their request, served on the Commissioners of Her Majesty's Treasury and the Paymaster-General.

Upon the petition coming on for hearing on January 14, 1888, Counsel for the Treasury asked that it might stand over until the next petition day; that Lidiard might be ordered to attend personally, notice being given him that the Treasury would seek to make him liable, and that he might appear by counsel and file affidavits if so advised. The petition was heard on January 21 and February 4, 1888.

Marten, Q.C., and *S. Hall*, for the petitioner.

Sir E. Clarke, S.-G., and *Ingle Joyce*, for the Commissioners of Her Majesty's Treasury and the Paymaster-General, submitted that Lidiard having assumed to act for the petitioner, both as solicitor and under the power of attorney, but without any real authority from or communication with her, and having obtained the fund upon the representation in effect that he was so authorized, and not having legally discharged himself of the fund so received, was, under the circumstances, liable to replace it: see *Re Spencer*, (1870) 18 W. R. 240; 21 L. T. (N.S.) 808.

Renshaw, Q.C., and *T. L. Wilkinson*, for Lidiard, admitted that they could not successfully dispute his liability.

KAY J. said that he entertained no doubt upon the matter. He was bound to say that, so far as he could discover, the miscarriage had occurred without the slightest fault of any of the gentlemen employed in his chambers; and he was quite certain that if the matter had come before him in court on the evidence which was submitted in chambers when the order of January 28, 1884, was improperly obtained, he should have made precisely the same order and been deceived in the same way as the chief clerk was deceived. The liability of Lidiard was clear. Having received this trust money, he was bound to discharge himself of it, and this he had failed to do. His Lordship absolved Lidiard from all participation in the crime, and believed that he was entirely ignorant of it; but his conduct in lending himself to a transaction of this kind, in keeping it secret from the real solicitors in the action, and in not insisting on having personal communication with the lady to whom the

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[KEKEWICH J. I have no jurisdiction to order the Crown to pay costs.]

fund belonged, constituted a grave dereliction of duty on his part, and the Court could have no hesitation in ordering him to refund the whole of the money. The Order of January 28, 1884, must accordingly be discharged, and an order made the terms of which his Lordship proceeded to indicate.

The order, which bore date February 4, 1888, was entitled, "In the matter of the sum of 4387*l.* 10*s.* 3*d.* Consolidated 3 per centum Annuities on January 28, 1884, standing in court to the credit of a certain action in the Chancery Division of the High Court of Justice, *Slater* v. *Slater* [(1864 S. 168)], 'The account of the issue or children of Rose Mabel Maxwell, deceased, and of the sum of 195*l.* 19*s.* 4*d.* cash, on the same date standing in Court to the same credit'"; and, after a recital of the order of January 28, 1884, proceeded, so far as is material, as follows: "And whereas upon the petition of Rose Maud Maxwell, &c., on December 20, 1887, preferred unto this Court, which coming on to be heard upon January 14, 1888, was adjourned, the respondents, the Commissioners of Her Majesty's Treasury, by their counsel requesting such adjournment and that they might have leave to serve John Francis Lidiard, one of the solicitors of the Court, in the said petition named, with a copy of the said petition, and a notice requiring him to attend personally upon the further hearing of the petition, with liberty to appear by counsel and to file affidavits in his own behalf if so advised, who was duly served accordingly; Now, upon the further hearing of the said petition upon this day, and upon hearing counsel for the petitioner and for the respondents, Her Majesty's Paymaster-General, the Commissioners of Her Majesty's Treasury, and for the said John Francis Lidiard, and upon reading the said petition, the decree made on the hearing of the cause, *Slater* v. *Slater* [1864 S. 168], dated January 21, 1865, the chief clerk's certificate dated March 14, 1868 [and certain orders and affidavits], and a certificate of the Paymaster shewing the amount of stock and cash which would have been in court to the credit hereinafter mentioned on February 4, 1888, if the order dated January 28, 1884, had not been made, and the orders dated, &c., for investment of dividends had not been stopped on the request of, &c., dated, &c., the certificate of payment of succession duty [Reg. M. 1865, fo. 519], dated May 20, 1887, and a certain exhibit, and upon hearing the evidence of the petitioner Rose Maud Maxwell, &c., upon their examination taken orally before this Court this day; This Court doth order that the order dated January 28, 1884, be discharged, And it is ordered that the funds mentioned in the payment schedule hereto be dealt with as mentioned in such schedule; and it is ordered that the said John Francis Lidiard do on or before April 4, 1888, make the lodgment into court mentioned in the lodgment schedule hereto, and it is ordered that the respondent John Francis Lidiard do pay to the petitioner Rose Maud Maxwell her extra costs of this petition beyond the costs of the petition and of the ordinary evidence which would be necessary to obtain the fund out of court if the fraud in the petition mentioned had not occurred, and in taxing such extra costs the taxing master is to treat the application for the Lord Chancellor's certificate of default as part of such

Renshaw, *Q.C.*, and *P. Rose-Innes*, for the respondent, Joseph Moses Marsh.

Sefton Strickland, for the respondent, Louis Frederick Moses Marsh.

Ingpen, for the respondents, the trustees of the settlement of 1858.

Cannot, for J. A. Hales.

Sir R. B. Finlay, *S.-G.*, and *Ingle Joyce*, for the Commissioners of the Treasury. We do not deny that we must replace the fund lost, but we submit that we are entitled to an order such as was made in *Slater* v. *Slater*, requiring Mr. Clear, the solicitor whose acceptance of the 15*l.* cheque for costs and neglect to institute inquiries or to inform the Court, when he found his name had been used without authority, conduced to the fraud by Hales, to make good the loss occasioned to the Treasury. The law as to the liability of a solicitor for negligence leading to a wrong payment of funds out of court is fully discussed and laid down in *In re Dangar's Trusts* (1), the principle being that a solicitor, as an officer of the Court, is bound to communicate to the Court all information which it ought to know in a matter in which he is concerned as solicitor. Again, Mr. Clear, having on August 12, 1895, become aware that an order had been made on the petition, having accepted the 15*l.* cheque, and not having taken steps to disavow all connection with the proceedings, must be treated as having ratified all that had been done, and must, on the authority of *In re Dangar's Trusts* (2), be held responsible, especially as being an officer of the Court, for the assertions made in the petition, particularly

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extra costs." Appended to the order were a payment schedule providing for transfer of 4992*l.* 4*s.* Consols and payment of 131*l.* 10*s.* 6*d.* cash (being the respective amounts of Consols and cash then in court to the credit of the action) to the petitioner, and a lodgment schedule providing for the lodgment by John Francis Lidiard on or before April 4, 1888, of the aggregate amount of the value at the bank average price on February 4, 1888, of the 4992*l.* 4*s.* Consols, and of the sum of 131*l.* 10*s.* 6*d.* cash, with interest subsequent to February 4, 1888, at the rate of 4 per cent. per annum.

Solicitors: *Clarke, Woodcock & Ryland; Hare & Co., for the Solicitor to the Treasury; J. F. Lidiard.*

C. C. M. D.

(1) (1889) 41 Ch. D. 178, 197, 198.

(2) 41 Ch. D. 192, 193.

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as to the existence of the alleged deed-poll of appointment, which was the ground upon which the Court made the order. He must therefore make good the loss which has resulted from those assertions and from his act or default. It is also a point for consideration whether Mr. Green is not equally liable as partner with Mr. Clear; but the question of Mr. Green's liability must of course depend upon the result of the case as against Mr. Clear.

Ashton Cross, for Mr. Clear. It is said that by taking the 15*l.* cheque Mr. Clear ratified the whole transaction.

[KEKEWICH J. It is more than that. If Mr. Clear had done what in my opinion, as at present advised, it was his duty to have done on August 12, the whole of the fraud would have been stopped.]

From the evidence it appears that Mr. Clear did not learn that his name had been made use of until about or shortly before one o'clock on August 12, and the 4000*l.* cheque was cashed between one and two o'clock; but it may have been earlier than that. It was therefore practically impossible for Mr. Clear to have made his inquiries in time to stop payment of the cheque, and he ought not to be made liable for it.

Again, nothing could have been done without the preliminary forgery of the alleged deed-poll of appointment recited in the petition.

[*Renshaw, Q.C.* The deed-poll has not yet been proved to be a forgery.]

Mr. Clear ought not to be held liable in damages for loss occasioned by the several steps taken before he had anything to do with the matter. When his friend Hales came to him on August 12, there was nothing to arouse his suspicions or to suggest fraud. What is now sought is to render Mr. Clear liable under the doctrine of "relation back"; but it would be stretching that doctrine too far to say that a man is liable for a long course of fraud of which he knew nothing. I say that Mr. Clear's negligence or misconduct (if any) was not the cause of the loss, and the damages are too remote. A solicitor cannot be fixed with damages which do not reasonably flow from his conduct.

Witt, Q.C., and *Ernest de Witt*, for Mr. Green.

[KEKEWICH J. I wish at present to hear the Solicitor-General in reply as regards Mr. Clear only.]

Sir R. B. Finlay, S.-G., in reply, again urged that Mr. Clear, in consenting to accept a sum for his costs in the matter, must be treated as having represented himself as the solicitor who, or whose firm, had been responsible for the presentation of the fraudulent petition; and that upon the principle of *In re Dangar's Trusts* (1), he was bound to make good all the assertions in that petition.

At the conclusion of the reply,

KEKEWICH J. stated that he should take time to consider the case as against Mr. Clear, and intimated that any argument in the case as against Mr. Green had better await the result of the judgment in Mr. Clear's case; for, if he should come to the conclusion that Mr. Clear was not responsible, he must hold a fortiori that Mr. Green was not.

This course having been assented to by the counsel for the Treasury and for Mr. Green,

HIS LORDSHIP said that there must be an immediate order discharging the order of July 13, 1895; also an inquiry whether the power of appointment given to the late John Moses Marsh by the settlement of 1858 was ever executed by him, and, if so, by what instrument or instruments; also an inquiry who were the parties entitled to the fund in court if the order of July 13, 1895, had never been made, and in what shares and proportions. The rest of the petition would stand over, with liberty to apply.

1896. March 5. KEKEWICH J. Concerning the jurisdiction of the Court, and the principle on which that jurisdiction is exercised, there is no room for doubt. The law is fully examined and expounded in the only case referred to in argument, *In re Dangar's Trusts* (1), and the principle to which I have above adverted is concisely stated in the following passage

(1) 41 Ch. D. 178.

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from Stirling J.'s judgment, commencing at the bottom of p. 197: "Mr. Nelson took upon himself a duty as an officer of the Court; and he must be held responsible for the discharge of his duty, that of bringing before the Court all matters which were essential for the Court to know, in order that the Court might deal properly with the fund." That principle has to be applied to Mr. Clear and to the circumstances of the case in hand. If and so far as Mr. Clear can properly be said to have acted as solicitor in the matter of the petition and in the proceedings consequent thereon, he must be held responsible for the fund affected thereby; and I should certainly hold him to have no less acted as solicitor because he took no personal part but allowed another to use his name. The Solicitor-General urged that Mr. Clear, having nominally acted as solicitor throughout, must be held responsible on this footing. Unless I discredited Mr. Clear's evidence, which I do not, it is plain that he knew nothing of the petition until Monday, August 12, 1895. According to Mr. Clear's evidence, which, besides being of itself worthy of credit, is supported by the other facts of the case, Mr. Clear had no reason to believe that John Arthur Hales had intended to use, or had used, his name until, on the morning of August 12, John Arthur Hales asked him to come to the Paymaster-General's office to receive a cheque for costs. It is proved by documentary evidence admitting of no question that the Paymaster-General's cheque for 6137*l.* 8*s.* 9*d.* was handed over to some person purporting to be Joseph Moses Marsh on Saturday, August 10; that on the same day it was paid into Child's Bank and cleared, and, an account having been opened there in the name of "Joseph Moses Marsh," a cheque for 4000*l.* was drawn against that account and cashed on the following Monday. The precise time when this cheque was cashed has not been, and probably cannot be, ascertained; but about one o'clock is sufficiently accurate.

How all this came to be done is, for the present, left in obscurity. I take it for granted that every endeavour will be made, if it has not already been made, to discover who personated Joseph Moses Marsh, and by what fraud the Paymaster-General was induced to deliver a cheque to a person without

title to it. But that does not concern me now. The facts sufficient for my present purpose are as above stated, and the conclusion is that the sum of 4000*l.* had passed away beyond control, if not before Mr. Clear knew or had reason to believe that his name had been improperly used, yet at any rate at such a time that no action, however energetic on his part, would have availed to stop it. To that extent I acquit him of blame and responsibility. On the morning of August 12, 1895, Mr. Clear was plainly told by John Arthur Hales that his name had been used without authority, and he was asked to go to the Paymaster-General's office to receive a cheque for costs thereby earned. He knew that John Arthur Hales had acted improperly, and said as much; but he apparently thought that it was an irregularity which he might as well condone, and he determined fully to condone it by accepting the cheque and dividing the cash, receiving for himself eventually only 4*l.* 5*s.* 6*d.* Of course he did not know that John Arthur Hales had been guilty of forgery, or that he had presented a petition in the name of "Joseph Moses Marsh" without authority; and what had improperly been done towards himself cannot, I think, be said to have put him on inquiry so as to give him notice of the greater iniquities. Yet I consider that, as an officer of the Court, he had no right to condone the impropriety, or at least had no right to condone it without first ascertaining that all that had been done in his name had been properly done, and that the proceedings had been so conducted that, adopting the words of Stirling J., all matters which were essential for the Court to know had been brought before it in order that the Court might properly deal with the fund. This he failed entirely to do; indeed, he was content to do nothing but accept the cheque without further question. It seems to me plain beyond all doubt that he is responsible for the amount of that cheque—namely, 15*l.* Whether he is responsible for anything more is a question of difficulty, the consideration of which has occasioned me anxious thought. On the one hand, I have no desire to judge harshly a man who, without fraudulent intention, failed to act up to a high standard of duty; and, on the other hand, I am bound to insist on strict observance by the officers

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of the Court of the duty which is imposed on them. The non-contentious business of the Court, which in many respects is far more important and requires greater care than contentious business, cannot be conducted satisfactorily without complete confidence by the judge in counsel and solicitors; and it is urgently necessary, in the interests of the public, that this confidence, which is seldom misplaced, should be maintained, and that consequently any breach of it should be severely treated. If, therefore, it is right, on the facts, to hold that, by reasonably prompt action after he became acquainted with the improper use of his name and must therefore be taken to have been aware of his duty, Mr. Clear could have preserved any part of the fund beyond the sum of 15*l.*, I think he must be held responsible for it.

After the cheque for 4000*l.* had been drawn out of Child's Bank, there remained to the credit of "Joseph Moses Marsh" there the sum of 2137*l.* 8*s.* 9*d.*; and, except so far as some portion of this has been recovered by proceedings with which I am not for the moment concerned, that amount has also been lost to the trust fund. Is Mr. Clear responsible for it? A further sum of 50*l.* was drawn out by cheque dated Monday, August 12, and apparently cashed on Tuesday, August 13, and no other sum was drawn out until about a month later. If the money had been still in court instead of in Child's Bank, I should not have hesitated; but can I hold Mr. Clear bound to take measures to recover, or rather to prevent loss of, the fund which had already passed out of the control of the Court? I remember a solicitor, well known and of high standing—Mr. Ouvry—coming into the Rolls Court one morning and addressing Lord Romilly when he took his seat. Lord Romilly told him that he could not be heard, but could instruct one of the counsel in court. His reply was, "I cannot instruct counsel—I have no client; but I wish to call your Lordship's attention to the fact that an order has been improperly made." The other details have escaped my memory and are immaterial, but I know that Lord Romilly listened to the application and stayed an order which, as in this case, had been made on petition. Why should not Mr. Clear have acted in like manner? What

he ought to have done is sufficiently obvious. It was the last day of the sittings; but Stirling J., the judge to whom the matter is assigned, though the order was made by myself, was sitting in chambers, and there could not have been the slightest difficulty in Mr. Clear going before him; and one cannot doubt that the learned judge would have directed a prompt inquiry into the circumstances of the case, and that notice would have been given to Messrs. Child not to part with the sum in their hands. It was certainly recoverable as the ear-marked proceeds of crime, and I have no doubt that Messrs. Child would have lent their best aid towards making the recovery as complete as possible.

I have not omitted to consider the difference between proximate and remote damages, but it seems to me that rules like that in *Hadley* v. *Baxendale* (1) ought not to be applied to a case where one is considering loss arising from a neglect of duty as distinguished from damages for breach of contract. If I am right in my opinion, that by prompt action of no extraordinary character Mr. Clear could have preserved the fund, the distinction to which I have just adverted ought not, in my judgment, to be applied so as to absolve him from liability.

My conclusion, therefore, is that Mr. Clear must be ordered to make good to the fund the 15*l.* and so much of the 2137*l.* 8*s.* 9*d.* as shall eventually be found to have been lost. A considerable sum has, as already noticed, been recovered from Child's Bank; but it was intimated in the course of the argument, and is reasonable, that some salvage costs will be payable thereout, and Mr. Clear can only have credit for the net amount. What this is must form the subject of inquiry.

There remains the question of costs. To some extent Mr. Clear must undoubtedly bear the burden of the costs incurred. It was so directed in *Slater* v. *Slater* (2), and follows from my judgment against him. Ought he to bear the whole costs when he is held responsible for only a part of the fund which it is the object of the petition to recover? I think he ought; and in truth no attempt to distribute the costs would be of any avail,

(1) (1854) 9 Ex. 341. (2) Ante, p. 222, n.

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as they have not been increased by the petition being directed to the recovery of a sum in excess of that for which Mr. Clear is responsible. The order must go against Mr. Clear, as against Mr. Lidiard in *Slater* v. *Slater* (1), for the payment of the costs of this petition beyond what would have been necessarily incurred to obtain the fund out of court if the fraud in the petition mentioned had not occurred; and these costs must be taxed as between solicitor and client.

Now, Mr. Witt, what do you propose to say with regard to your client, Mr. Green?

Witt, Q.C. Accepting that judgment of your Lordship's, I should ask you, even without further argument, to acquit Mr. Green.

KEKEWICH J. I do not wish to say anything definitely without hearing you. I wish, however, distinctly to state, having considered the evidence, that I acquit Mr. Green entirely of all moral blame. I do not think it is possible, on the evidence, to suggest that he has done anything wrong: as regards him, it is a mere question of partnership liability. If, Mr. Witt, you desire to argue that question, you shall have an opportunity of doing so.

Witt, Q.C., having expressed his desire to argue that question,

KEKEWICH J. adjourned the further hearing of the petition accordingly, adding: You will not neglect, Mr. Witt, I am sure, to give full consideration to the judgment of the Court of Appeal in *Rhodes* v. *Moules* (2), in which their Lordships came to a different conclusion to myself as to the liability of a partner who was himself perfectly free from moral blame.

1896. March 11. *Witt, Q.C.*, and *Ernest de Witt*, for Mr. Green. The first ground on which your Lordship's judgment proceeded was that there had been a condonation by Mr. Clear.

(1) Ante, p. 222, n. (2) [1895] 1 Ch. 236.

What was it that he condoned? If the act condoned was one not within the scope of the partnership authority, then no liability attaches to his partner. The act said to have been condoned is the use by Hales of Mr. Clear's name. Now we submit that a solicitor, in lending his name to another, is not acting within the scope of the partnership, because it never can be done rightly.

[KEKEWICH J. I am not prepared to assent to that.]

He cannot rightly lend his name without inquiring for what purpose it is required, and in what matter it is to be used.

[KEKEWICH J. To that I assent.]

Here Mr. Clear never made any such inquiries, and therefore his act in allowing the use of his name was not within the scope of the partnership. To establish any liability as against Mr. Green, the case must be brought within s. 10 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which enacts that "where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act." Now, lending the name of the firm by one partner without inquiry is so improper that it cannot be regarded as an act within "the ordinary course of the business of the firm." The case is, we submit, covered by the recent case of *Mara* v. *Browne* (1), where it was held by the Court of Appeal that it is not within the scope of the implied authority of a solicitor to constitute himself a constructive trustee and then to subject his partner to liability in that character, the partner being ignorant of the dealings creating the constructive trust.

With regard to *Rhodes* v. *Moules* (2), to which your Lordship referred on the last occasion, that was the case of a fraud by a partner, and turned solely on ss. 11 and 12 of the Partnership Act, 1890, and not upon s. 10, under which alone Mr. Green can be made liable, if at all. One partner cannot be made liable merely for the omission of the other to give information

(1) [1896] 1 Ch. 199. (2) [1895] 1 Ch. 236.

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which he ought to have given as an officer of the Court. Upon the whole we submit that Mr. Clear's liability ought not to be extended to his partner, Mr. Green.

Sir R. B. Finlay, *S.-G.*, and *Ingle Joyce*, for the Commissioners of the Treasury, were not called upon.

KEKEWICH J., after expressing the hope that, having regard to the great importance of the case to the profession as well as to the parties, his judgment against Mr. Clear and also the judgment he was now about to pronounce might be considered by the Court of Appeal, continued:—

My judgment against Mr. Clear proceeded on this, that, inasmuch as from the time that he knew that his name had been improperly used he failed to take the steps which I thought he ought to have taken, he had condoned that improper user, and must be regarded as having acted as the solicitor for the petitioner, not merely as on August 12, but as from the date of the presentation of the petition, and therefore throughout the whole proceedings.

I agree in the general principles which have been urged by Mr. Witt. I agree that a partner cannot be made liable for what is not within the scope of the partnership. I agree that it is not within the scope of a solicitor's authority to lend the name of his firm purely and simply, as Mr. Witt puts it; but I see no reason at all why, with proper precautions, a solicitor should not lend his own name, or the name of his firm, for proper proceedings. I will not pause now to consider what those proper precautions are; but they involve this, that the solicitor should have a control of the use of his name, and know precisely from time to time to what extent it is being used, and, further, for what purposes, taking the risk, of course, of any abuse that may be made of the permission. When Mr. Clear, on August 12, 1895, said in effect, "What has been done hitherto in my name has been done with my authority: I adopt it: I take these costs, and take them as part of my costs as solicitor," the result was that, as from the presentation of the petition, he was responsible for everything that had been done, and he was bound to see that it was done properly. It

seems to me that, to that extent, he was perfectly entitled to pledge his partner's name.

If he had done so in the first instance with proper precautions, I cannot doubt that Mr. Green would have been liable; and I fail to see why Mr. Green should not be liable now. Of course, if my judgment against Mr. Clear is disturbed, Mr. Green, as I said before, will, a fortiori, be absolved. If my judgment against Mr. Clear stands, it seems to me to carry equal weight as against Mr. Green.

It is only fair that I should again repeat what I said before, that I acquit Mr. Green of all personal blame; and my judgment against him proceeds purely on the question of law. Has Mr. Clear committed him by what he did, and fixed on him a responsibility which he did not himself undertake? In my opinion he has; and, therefore, the order must provide for the same consequences against Mr. Green as it was intended should be provided against Mr. Clear. The minutes of the order must be agreed upon between the junior counsel; but I desire that the order made by Kay J. in *Slater* v. *Slater* (1) be followed as closely as circumstances will permit. The effect of it will be that Messrs. Clear & Green will be jointly and severally liable to replace the 2137*l.* 8*s.* 9*d.* mentioned in my former judgment, or so much thereof as shall be found, on inquiry, to have been lost to the trust fund; and they must also be ordered to pay the costs of this petition beyond what would have been necessarily incurred to obtain the fund out of court if the fraud in the petition mentioned had not been committed; and these costs must be taxed as between solicitor and client.

Witt, Q.C. Will your Lordship not draw a distinction between Mr. Clear's costs and Mr. Green's?

KEKEWICH J. I cannot do that; but I do not mind saying I wish I could.

Two separate orders were made on the petition—one on February 26, 1896, discharging the order of July 13, 1895, as

(1) Ante, p. 222, n.

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above mentioned, and the other on March 11, 1896, as the result of his Lordship's judgments as against Mr. Clear and Mr. Green.

The order of February 26, was, so far as is material, as follows:—

"Upon the petition of, &c., and upon hearing counsel, &c., and upon reading, &c., This Court doth order that the said order dated the 13th of July, 1895, whereby it was ordered that the funds in court, being the funds hereinafter referred to, should be dealt with as in the payment schedule to the said order mentioned, be and the same is hereby discharged. And it is ordered that the following inquiries be made, that is to say—(1.) An inquiry whether the power of appointment by the indenture dated the 9th of July, 1858, in the petition mentioned, conferred upon John Moses Marsh in the petition named, by his then name of Jacob Moses, was ever executed by him, and if so, by what instrument or instruments: (2.) An inquiry who is now entitled to the stocks and cash which would have been standing to the credit of this action, '*Marsh* v. *Joseph*, 1877, M. 123,' had the said order dated the 13th of July, 1895, not been made, and in what shares and proportions. And the further hearing of the said petition is adjourned."

The order of March 11, 1896, was, so far as is material, as follows:—

"Upon the further hearing of the petition of, &c., which further hearing was adjourned by the order dated the 26th February, 1896, coming on the 5th March, 1896, and this day to be heard accordingly as to the liability of the respondents John Clear and James Ernest Green and the said John Arthur Hales, and upon hearing counsel, &c., and upon reading, &c., This Court doth order that the said John Arthur Hales do on or before the 11th June, 1896, or subsequently within four days after service of this order pay into court, as in the lodgment schedule hereto, 6162*l.* 8*s.* 9*d.*"—the aggregate of the Paymaster-General's cheque for 6137*l.* 8*s.* 9*d.* and the cheques for 15*l.* and 10*l.* for costs—"And this Court doth declare that the said J. Clear and J. E. Green respectively are jointly and severally liable to the extent of 2051*l.* 0*s.* 5*d.* (being the aggregate amount of the cheque for 15*l.* received by the said J. Clear for costs under the said order of the 13th July, 1895, since discharged by the said order of the 26th February, 1896, and the three sums of 50*l.*, 20*l.*, and 1966*l.* 0*s.* 8*d.* withdrawn from the said banking account with Messrs. Child & Co. after the 12th August, 1895) less so much of the said sum of 1966*l.* 0*s.* 8*d.* as, after payment of the costs, charges and expenses which the Court may think fit to direct to be paid thereout, may eventually be replaced out of the capital or corpus of the funds representing the money paid into court to the credit of this action 'Balance of moneys in the hands of Messrs. Child & Co. in the name of Joseph Moses Marsh' pursuant to the said order of the 24th October, 1895. And it is ordered that the following inquiry be made: An inquiry what is the amount for which the said J. Clear and J. E. Green are liable to pay upon the footing of the declaration aforesaid. And it is ordered that the said J. Clear and J. E. Green do pay into court to the

credit of this action 'Money replaced pursuant to order of 11th March, 1896,' as in the schedule hereto, the sum that shall appear to be due from them by the chief clerk's certificate in answer to the aforesaid inquiry within one month from the date of the chief clerk's certificate of the result of such inquiry. And it is hereby referred to the taxing master to tax the costs of the Paymaster-General and of the Commissioners of Her Majesty's Treasury, and, as between solicitor and client, the extra costs of the petitioners and of the respondents"—naming other parties interested under the settlement of 1858—"beyond their costs of a petition and the ordinary evidence which would have been necessary to obtain the order of the 26th February, 1896, if the fraud in the petition mentioned had not been committed: and it is ordered that the said J. Clear and J. E. Green do pay the said costs when taxed; and the costs of the inquiry hereinbefore directed are reserved. And it is ordered that the rest of the petition as to dealing with the funds in court do stand over until after the said inquiry has been answered."

Attached to the order was the lodgment schedule therein referred to.

G. I. F. C.

From these judgments there were cross-appeals. Mr. Green gave notice of appeal on May 21, 1896, the Crown on May 22, 1896, and Mr. Clear on June 10, 1896. These three appeals came on for hearing on November 19, 1896, and the appeal of the Crown was taken first.

Sir R. B. Finlay, S.-G., and *Ingle Joyce*, for the Commissioners of the Treasury. The learned judge came to the conclusion that by prompt action of no extraordinary character Mr. Clear might have preserved the fund, and that instead of so acting he had condoned the impropriety of which Hales had been guilty; but his Lordship has failed to carry his conclusion to its legitimate consequence of fixing Mr. Clear with liability for the entire loss of 4171*l.* 8*s.* 1*d.*, and has held him liable for part only. So, also, he should have held Mr. Green, as partner, equally liable for the whole loss.

Condonation in this case is the same thing as ratification; and there was here a complete ratification and adoption by Clear of the use of the name of his firm for whatever purpose it had actually been used. By his conduct in this transaction Clear has placed himself in the same position as if he had authorized the use of his firm's name in the first instance. For, knowing that his name had been used without his

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authority, he has ratified the unauthorized acts done in his name, and comes within the maxim "Omnis ratihabitio retrotrahitur et mandato priori equiparatur."

[A. L. SMITH L.J. According to Willes J. in *Phosphate of Lime Co.* v. *Green* (1), ratification to be binding must either be with full knowledge of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances.]

We accept that statement of the law so far as it goes. A principal is not liable for the acts of his agents unless, (1.) he ratifies those acts with knowledge, or (2.) means to take upon himself without inquiry the risk of any irregularity which the agents may have committed and to adopt all their acts: "The latter alternative is equivalent to ratifying with knowledge because the intention to adopt the act at all events is the same as adopting it with knowledge." In this case Clear took upon himself without inquiry the risk of any irregularity: *Freeman* v. *Rosher* (2), *Lewis* v. *Read* (3), *Brook* v. *Hook* (4), *M'Kenzie* v. *British Linen Co.* (5), and *Bolton Partners* v. *Lambert.* (6)

As it is put in Story on Agency (9th ed.), s. 244, "the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy": see also Chalmers on Bills of Exchange (5th ed.), pp. 71, 73; notes to s. 24. The principle of *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (7) does not apply.

It is said that Clear was only told that the name of the firm was to be used for a formal party; but he knew that he was to represent as solicitor some one whom Hales could not represent, and without whom the business could not be carried through; in other words, that he was to represent a necessary party. And when he accepted from the Paymaster-General on August 12, 1895, the cheque for 15*l.* for his agreed costs, headed "*Marsh* v. *Joseph*," he must be taken to have known that an order dealing with money in court had been made,

(1) (1871) L. R. 7 C. P. 43, 57.
(2) (1849) 13 Q. B. 780, 789.
(3) (1845) 13 M. & W. 834.
(4) (1871) L. R. 6 Ex. 89.
(5) (1881) 6 App. Cas. 82, 89.
(6) (1889) 41 Ch. D. 295.
(7) (1887) 18 Q. B. D. 714.

and made upon the footing that a necessary party had been represented by him, whereas in point of fact he had received no authority from such party and had never had any communication with him—did not even know his name, and never cared to inquire. The slightest communication with the real client would have brought the whole fraud to light. Surely he must be taken to have ratified the whole of the previous proceedings whether fraudulent or not. His duty was instantly to have disavowed what had been done, and to have communicated with the Paymaster-General; and if he chooses to shut his eyes, to receive the money, and to remain silent, he cannot escape the full responsibility for the loss.

In the case of orders made by consent for the payment of money out of court, it is of infinitely more importance that a strict adherence to the rules of practice should be exacted from solicitors, and that the name of a solicitor should never be improperly used, than it is in contentious business. A solicitor is an officer of the Court and its "sentinel." Solicitors have a monopoly of its business; and where loss has been occasioned by negligence or breach of duty on the part of a solicitor, the Court will hold its officer responsible and order him to make it good. In this case Clear's obvious duty was to see his supposed client and to protect the fund: *In re Dangar's Trusts* (1); *Re Ward* (2); *Re Spencer*. (3) It is essential for the safety of the public that the Court should be able to rely with confidence upon its officers, and no amount of vigilance will do away with this necessity. We are here asking the Court to exercise its disciplinary jurisdiction: *Brydges* v. *Branfill* (4); and the Court is entitled to look to its own officer to make good representations made in his name, not only in cases of negligence, but also in cases of fraud, and all that it would require to know would be whether the name of the officer was used by his authority.

But if Clear is not liable for the entire loss, he is at all events liable for so much of it as arose from his not having made any communication to the Paymaster-General. As to Green, he is

(1) 41 Ch. D. 178.
(2) (1862) 31 Beav. 1.
(3) 18 W. R. 240.
(4) (1841) 12 Sim. 369, 388.

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liable equally with Clear for the entire loss. As a partner in a firm of solicitors he received partnership money purporting to be received in respect of business within the scope of the ordinary business of the partnership, i.e., the appearing for a party in legal proceedings; for so this must be regarded, although there was gross irregularity in the mode it was conducted; and he comes within the principle of *Norton* v. *Cooper* (1), that each individual member of the partnership is primâ facie liable and responsible to the Court for any misconduct.

Ashton Cross, for Mr. Clear. No such order as that of July 13, 1895, ought to have been made upon the evidence then before the Court, and counsel ought to have called the attention of the Court to the fact that there was no proper proof of the execution of the alleged deed of appointment. Moreover, "John Clear & Co., Serjeants' Inn," was upon the petition and the brief as the solicitor's name and address. That was not the name and address of Clear's firm, and there was no such firm as that in existence. The name and address of Clear's then firm was "Clear & Green, No. 1, Old Serjeants' Inn, Chancery Lane."

But the main point is that the loss was in fact occasioned by the fraud of Hales, carried out by the forged appointment and the personation of Marsh; and the money had gone from the Paymaster-General out of the control of the Court and into Child's Bank two days before Clear came upon the scene; so that in no case could Clear have made himself liable for the 4171*l.* 8*s.* 1*d.* It is said that by weakly accepting 4*l.* 5*s.* 6*d.*, Clear adopted everything that had been previously done, and made himself liable for the whole loss; and the case is put upon the ground that he made representations which he was bound to make good, and that as an officer of the Court he is liable, although a layman in the same position might not be so. But Clear never adopted or ratified anything that he did not know of, nor anything that had been wrongly done, nor was he guilty of anything like negligence, much less fraud. He had no reason to suspect Hales, and although he admits that he was guilty of some impropriety,

(1) (1856) 3 Sm. & Giff. 375.

there was nothing to startle him or put him on inquiry; and any inquiry that he might then have made would, moreover, have been too late as to the 417*l.*, and might have led to the loss of the remainder of the fund. All that he can possibly be liable for is the amount of the 15*l.* cheque, which is the measure of the loss arising from the only act which can be laid to his charge. If he ratified anything at all it was the use of his name for a formal party and purpose. The real question is, Does he stand in Hales' shoes? And it cannot be contended that he does. He was the victim of a fraud conceived and carried out by Hales for his own purposes behind Clear's back; and there is no case in the books in which a solicitor has ever been held under such circumstances to be liable, either upon the doctrine of ratification or upon that of representations made by him as an officer of the Court.

Witt, Q.C., and *Ernest de Witt*, for Mr. Green. This is not a case of ratification by Clear, but of a personal adoption by him of a position which had been allocated to him by Hales, and there was no adoption of any criminal act: *Scholfield* v. *Earl of Londesborough*. (1)

Anyhow, Green cannot be liable for more than the 4*l.* 5*s.* 6*d.* which he received from Clear. Upon what ground could the Commissioners of the Treasury, who have had to replace this fund under the Court of Chancery (Funds) Act, 1872, frame an action against Mr. Green to replace it? A solicitor has no right under any circumstances to lend his name or that of his firm to another solicitor. It would not, therefore, be within the ordinary scope of a solicitor's business for a partner to do so. Accordingly, his innocent partner would not be liable if he did, and the delinquent partner could not ratify the use of the firm's name if it had been used without authority so as to bind his innocent partner. Again, the name used in this case was not the name of the firm; and if it had been, as Green could not adopt or ratify the lending of it to another solicitor, a fortiori he could not adopt or ratify the lending of it to an uncertificated person who was not entitled to practise as a solicitor.

[They referred to *Mara* v. *Browne* (2); 6 & 7 Vict. c. 73 (1843),

(1) [1896] A. C. 514. (2) [1896] 1 Ch. 199.

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s. 32; 23 & 24 Vict. c. 127 (1860); 33 & 34 Vict. c. 97 (1870), s. 59; and 37 & 38 Vict. c. 68 (1874).]

Stewart-Smith, for certain beneficiaries who were respondents to the appeals of Messrs. Clear & Green.

Sir R. B. Finlay, *S.-G.*, in reply, referred to the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 16, and Lindley on Partnership, 6th ed. pp. 137–9.

LORD RUSSELL of KILLOWEN C.J. As the case is one of considerable importance, we shall take time to consider our judgment.

1896. Dec. 18. LORD RUSSELL of KILLOWEN C.J. delivered the judgment of the Court (Lord Russell of Killowen C.J., Lindley and A. L. Smith L.JJ.). His Lordship began by stating the facts of the case down to the conclusion of the interview between Hales and Mr. Clear in July, 1895, at the office of Clear & Green, remarking that, at this interview, when Hales asked Green to act for one of the formal parties in some business, the name of the case was not mentioned, nor the character of the business, nor the name of the supposed formal party for whom Clear & Green were to act, and those gentlemen heard nothing further about the matter until after the consummation of Hales' fraud, and after payment out by the Paymaster-General of the fund in question.

His Lordship then stated the facts with reference to the petition presented by Hales in the name of Joseph Moses Marsh, the obtaining of the order thereon and of three cheques from the Paymaster-General, and the opening of and the drawing upon the account at Child's Bank, and continued:—Shortly put, the means by which the money was obtained out of court were the fraudulent contrivances of Hales, either acting alone or in complicity with some other person or persons. There was no deed of appointment by John Moses Marsh—the document produced was a forgery; and no affidavit in verification of the petition had been made by Joseph Moses Marsh. The proceedings were in fraud of that person and the other persons beneficially interested. Ultimately, in October, 1895, Hales was, upon his own

confession, convicted at the Old Bailey for forging the name of Joseph Moses Marsh on the back of the cheque for 6137*l.* 8*s.* 9*d.*

Between July, 1895, and August 12, 1895, there had been no communication of any kind between Hales and Clear & Green. It will be seen that at the latter date Hales' fraud was complete; he had got the fund in question out of court and under his control, and two cheques against it had been paid.

[His Lordship then adverted to the facts above stated with reference to the interview between Hales and Mr. Clear about one o'clock on the afternoon of August 12, 1895, and to the taking and cashing of the cheque for 15*l.* by Mr. Clear, and his handing of the balance of 4*l.* 5*s.* 6*d.* to Mr. Green, and continued:—]

This was the sole connection of Green with the matter. It is to be noted that Kekewich J. accepted as true the foregoing account given by Clear of the facts so far as he was concerned. The learned judge explicitly finds that Clear had no reason to believe that Hales had intended to use or had used his name until August 12, 1895. As to Green, he also explicitly acquits him of all personal blame. I think these conclusions of the learned judge were warranted by the evidence. It is unnecessary to refer to the fact (which seems to me irrelevant in view of these findings) that in January, 1895, Hales asked Clear to "identify" him at the Paymaster-General's Office, and that Clear did so.

[His Lordship then referred to the other occurrences which took place on August 12; and after concluding the statement of the facts of the case, continued:—]

Upon this state of facts the persons defrauded petitioned the Court for relief against the Paymaster-General or the Commissioners of the Treasury under the Court of Chancery (Funds) Act, 1872.

The claim to this relief was not denied; but on the hearing of the petition it was alleged on the part of the Treasury that Clear and Green were, as officers of the Court, liable to make good the moneys lost, and the Court was asked so to order.

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The question then was before Kekewich J., and now is before us, whether on the facts stated the firm of Clear & Green or any, and, if so, which, member of the firm is liable for any, and, if so, for what, part of the moneys lost.

The learned judge, as I understand, acquitted Clear of responsibility in respect of all moneys drawn from the account at Child's Bank up to and including August 12. He says expressly that, in his judgment, no action, however energetic on Clear's part, would have availed to stop the payment of the 4000*l.* cheque on August 12; but he finds that Clear on that day condoned what he (Clear) thought was an irregularity in the use of his name, and the learned judge makes him liable to repay the amount of the 15*l.* cheque, and for any loss by withdrawal from Child's Bank after the date of August 12. This would represent a liability of Clear for 15*l.* and 50*l.* and 20*l.*, in all 85*l.* As to Green, the learned judge, while, as I have said, acquitting him of all personal blame, arrives at the conclusion that Clear was acting within the scope of the partnership authority in what he did, and that, therefore, Green is subject to the same liability as his partner.

From these judgments there are cross-appeals. On the argument before us the discussion proceeded on the appeal of the Crown, for whom it was contended that the learned judge had rightly found that Clear had on August 12, 1895, condoned or ratified the use of his name, but that the learned judge had failed to carry that conclusion to its legitimate consequences by fixing Clear with the results, which, it was contended, followed upon the use of his name, and that he was legally liable for the entire loss—namely, 4171*l.* 8*s.* 1*d.*, and for the cheques of 15*l.* and 10*l.* for costs. It was further contended that Green was likewise liable for the acts of his partner. On the other hand, it was contended for Clear that his liability was limited to the repayment of the amount of the 15*l.* cheque, and for Green that his liability was limited to the 4*l.* 5*s.* 6*d.* received by him for the partnership.

We have now to consider these various contentions. No question of jurisdiction was raised before us, but I think it important to state the principle upon which the Court acts. It

is that where negligence or other breach of duty is committed by a solicitor, an officer of the Court, in a matter in which the Court has seizin, the Court may, and, if it can do full justice, will summarily order its officer to make good the loss occasioned by his neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The Court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the act of negligence or misconduct. In the present case the learned judge has divided the loss into (1.) the loss which he considers occurred up to and including August 12, and (2.) that after August 12, and he has fixed Clear & Green with the latter loss only.

Before considering whether this is correct, it will be convenient to deal with the broader contention of the Crown—namely, that the firm are liable for all the loss whenever it occurred. Apart from the doctrine of ratification, it cannot be pretended that there was any ground for fixing Clear or Green with liability. Neither had done any blameworthy thing. Neither had authorized the use of the firm's name. Neither knew up to August 12 that the firm's name had in fact been used for any purpose, and when, on that day, Clear learned that it had been used, the mischief had been done, the money had gone out of the control of the Court and into that of the perpetrator of the fraud. The money was lost, and the question was not whether the loss could be prevented, but whether any of it could be recovered.

How had it been obtained? It had been obtained by reason of the order of the Court of July 13, 1895, which in its turn had been obtained by the fraudulent fabrication of the deed-poll and of the affidavit purporting to verify it, followed by the petition containing untrue statements, and the employment by Hales in Clear's name of counsel for the petitioner to support the petition, and of counsel by Hales in Hales' name to consent to the prayer in the petition. Of all this Clear & Green were ignorant. Indeed, it is obvious that if Hales had not chosen to mention the cheque for 15*l.* to Clear, in order to get out of it the fees paid to counsel, the fraud would have been

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equally successful and complete; or, again, if he had used the firm's name without any such conversation as occurred in July.

What, then, is the true effect of what takes place on August 12? To appreciate this one must recur to the conversation in July, when Clear was asked by Hales whether he would act for a formal party, and said he would if instructed. On August 12 Hales in effect says to Clear, "I did not think it worth troubling you about the formal business I mentioned in July. It was simple; I did it myself. There's a cheque for 15*l.* for you, but you'll have to return me all for counsel's fees which I have paid, except 4*l.* 5*s.* 6*d.*, which you keep for yourself." Clear complained of the use of his name, reprimanded Hales, but kept and paid to his partner this 4*l.* 5*s.* 6*d.* I doubt whether this is any ratification in any real sense; but assuming that it amounts to ratification, of what is it ratification? At most it was ratification of the use of his name in a formal matter for a formal party. Is that enough to fix him with liability for what had been fraudulently done by Hales for his own purposes? I think not. Clear did not know that his name had been used for the petitioner, nor that the object of the petition was to obtain payment out of a fund in court. The amount of the cheque was not such as to suggest that the work had been other than the employment of counsel for a formal purpose, as for a change of investments or appointment of new trustees, or the like. In a word, there was nothing to suggest in the remotest way that Hales had for his own fraudulent purposes used Clear's name and been a party to forgery and perjury in effecting those purposes.

We are not called upon to act in business as if every man with whom we come into relations is a thief, and therefore men's actions are not to be judged by a standard of unbelief in professional honesty. To constitute a binding adoption of acts a priori unauthorized these conditions must exist: (1.) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take

upon himself the responsibility for such acts, whatever they were. In the present case, although the name of Clear (J. Clear & Co.) was used, it is apparent that that user and the other fraudulent acts of Hales were done for his own purposes. It is admitted that Clear had no knowledge of the fraud which had been committed, and in my judgment it is impossible properly to draw the conclusion that Clear by taking the cheque for 15*l.*, and keeping the 4*l.* 5*s.* 6*d.*, intended unqualifiedly to take upon himself the responsibility for what had been done, however wickedly and fraudulently it had been done. To use the language of Kekewich J., he condoned what he believed was a mere irregularity. Where the supposed ratification relates to acts as to which there is no pretence of any a priori authority, as in this case, where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were. I find an absence of such knowledge and an absence of any ratification except this—putting it at the highest—a ratification of the use of the name of the firm for a formal party. Such ratification is not enough to fix Clear or Green with the fraudulent acts of forgery and perjury, or with the fraudulent statements in the petition to which Hales, to further his own ends, was a party.

It follows from what I have said that, even if Clear had a priori authorized the use of his name for a formal party, he would not be responsible for the acts of fraud and forgery committed in this case by his supposed agent for that agent's own fraudulent purposes. In my judgment, therefore, the contention of the Crown fails as against both Clear and Green. It remains to consider whether Kekewich J. was right in fixing Clear and Green with the loss—as it is called—after August 12 as well as with the amount of the 15*l.* cheque.

First, as to Clear. Obviously the judgment must stand against Clear for the 15*l.* He received the cheque for 15*l.*, part of the fund in court fraudulently obtained, and he has not

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validly discharged himself of it. As to the rest, I have already pointed out that in my judgment the loss was complete when the cheque of the Paymaster-General was credited as cash by Child's Bank on August 10, two days before Clear knew that the firm name had been used, and that the only question then was whether any of that loss could be recovered back. I understand the learned judge to have proceeded on the ground that Clear had failed in his duty in not promptly informing the Court that his name had been used without his authority.

But assuming for the moment this failure of duty, did it prevent the recovery of any part of the money? It is said it did, for that if Clear had informed the Court a stop would have been put upon the account at Child's Bank, and the cheques for 50*l.* on August 13 and for 20*l.* on September 14 would not have been honoured. Is this so? I agree that Clear ought to have resented as grossly improper the unauthorized use of his name. Suppose he had said so in stronger terms than he did to Hales, and added, as many men acting on a high standard of professional conduct would have done, "I will straightway inform the Court," is it not probable that Hales would at once have withdrawn the bank balance? Is it not further probable that the balance of 1966*l.* 0*s.* 8*d.* which was recovered was allowed to remain because Hales was, in the absence of any threat of this kind, lulled into a false sense of security? Indeed, if Clear had gone to the Court all that he could have said was that he thought it proper to state that his name had been used without authority, but whether used for any improper purpose he could not say, and some time must have been occupied by inquiring before any action could be taken, and meanwhile it is not probable that Hales would have been idle.

I cannot see my way, therefore, to the conclusion that Clear's silence in any sense led to any part of the loss.

But further, to hold Clear liable to make good the 50*l.* and 20*l.* drawn out from Child's Bank after August 12 can only, in my judgment, be right upon the assumption that Clear knew or ought to have suspected that a dishonest use had been made of his name, and that prompt action would, or might, prevent or lessen any loss following upon that dishonest use. But Clear

had no knowledge or even suspicion of anything of the sort. To hold him liable for these sums is to hold him responsible for a breach of duty which is not imposed by any known legal principle, and which the Court is not warranted in imposing on its officers. To do so would be too oppressive on honest men desirous of doing right.

This conclusion is quite consistent with cases relied upon by counsel for the Crown, for in all of them the solicitor who was held liable for money improperly obtained out of court had done far more than Clear did in this case. In *Slater* v. *Slater* (1) the solicitor had allowed his name to be used for the petitioner upon whose application the money was obtained, and that solicitor actually received the money. So in *In re Dangar's Trusts* (2) the solicitor held liable was the solicitor for the petitioner who obtained the money; he took an active part in obtaining the money, and his negligence, or that of his clerk, caused the loss. In *In re Ward* (3) and in *Todd* v. *Studholme* (4) the solicitor had the conduct of the suit and was held liable for his negligence in it. In *Re Spencer* (5) the solicitors had acted for the petitioners, and their negligence caused the loss for which they were held liable. In *Brydges* v. *Branfill* (6) the solicitors were the solicitors for the petitioners, and they received the money. Clear's conduct does not bring him within the principles applicable to any of these decisions.

As to Green, it follows from what I have said that as to him the question is narrowed to this: Is he liable, jointly and severally, with Clear for the 15*l.*, or only for the 4*l.* 5*s.* 6*d.* which he received from Clear and paid into the bank account of the firm as part of the partnership assets? That he is liable for the 4*l.* 5*s.* 6*d.* is obvious, and upon the grounds which apply to the 15*l.* cheque in the case of Clear. Is he liable for anything more? I think he is not.

The learned judge, as I gather, proceeded on the ground that it was within the scope of the agency authority created by the partnership for one partner to allow the use of the name of the

(1) Ante, p. 222, n.
(2) 41 Ch. D. 178.
(3) 31 Beav. 1.
(4) (1857) 3 K. & J. 324.
(5) 18 W. R. 240.
(6) 12 Sim. 369.

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firm by another solicitor and thereby to bind his co-partner. Is that sound? As a proposition of law I know of no authority for it, and I confess I should be surprised to find that it was usual to do so. But any such usage must be established by evidence; the Court cannot, as a matter of law, say that there is any such usage, and I do not find that in this case any evidence to that effect was given or offered.

Indeed, in this case, the question is not merely whether the permission to use the firm's name was within the scope of the partnership authority, but whether it was within such authority to ratify ex post facto the unauthorized use of such name. In the absence of any evidence of usage or course of business on these points, I come to the conclusion that the 15*l.* cheque received by Clear was not received by him in respect of any transaction in which he had a right to engage on behalf of the firm. The receipt of the cheque was not the receipt of the firm, nor was Clear's knowledge of the receipt and of the circumstances under which he received it the knowledge of the firm. Green's liability began and ended with the receipt by him from Clear of the 4*l.* 5*s.* 6*d.* cash, and is confined to that sum.

The result, therefore, in my judgment, is that Clear's liability must be reduced to the sum of 15*l.*, and of Green to the sum of 4*l.* 5*s.* 6*d.*, part of the 15*l.*, and the order appealed from must be varied accordingly.

The costs of and consequent on the petition of the petitioners and the respondents other than the Paymaster-General and the Commissioners of Her Majesty's Treasury, and other than Hales, Clear, and Green, and except so far as such costs have been increased by the conduct of the Paymaster-General and the Commissioners of Her Majesty's Treasury, must come out of the fund in court.

The costs of the petitioners and respondents other than Hales, Clear, and Green so far as they have been so increased as aforesaid, must be paid by the Commissioners of Her Majesty's Treasury.

The commissioners must pay the costs of their appeal to Clear and Green and the parties interested in the fund, and

there will be no costs of Clear's appeal and Green's appeal. Messrs. Clear & Green must be relieved from the costs which they were directed to pay under the order of Kekewich J.; but they cannot be allowed their own costs.

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Solicitors: *Hare & Co.; Mear & Fowler; H. J. Lewis; Roy & Cartwright; P. J. Gordon & Co.; J. Clear; J. E. Green; F. Hill.*

W. W. K.

In re ISAAC.
CRONBACH *v.* ISAAC.

[1886 I. 1745.]

C. A. 1897 *Jan.* 20, 22.

Practice—Costs—Trustees—Administration Action—Severance in Defence—Apportionment of Costs—Right of Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 1.

A trustee ought not to be deprived of his costs out of the trust estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate.

He ought to have an opportunity of explaining the reasons for his severance, so that the Court may be able to decide judicially whether the severance was improper.

The allowance of the costs of a trustee out of the trust estate is not a matter "left to the discretion of the Court" within the meaning of s. 49 of the Judicature Act, 1873; and consequently a trustee has a right to appeal against an order depriving him of costs out of the estate, and giving the whole of the costs to his co-trustee.

Decision of Kekewich J. reversed.

APPEAL by Saul Isaac, one of the defendants and one of the trustees and executors of the will of Samuel Isaac, the other trustee and executor being the defendant Louis Solomon, against a part of the order made by Kekewich J. on the further consideration of the action, whereby it was referred to the taxing master to tax as between solicitor and client the costs of the plaintiffs and the defendants, including in the taxation any charges and expenses properly incurred by the defendants Louis Solomon and Saul Isaac, as executors of the will of the testator, beyond their costs of the action, and not

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already taxed or allowed, and "in taxing the costs of the defendants Louis Solomon and Saul Isaac the taxing master is to allow a separate set of costs to each of the said defendants down to November 14, 1887, but only one set of costs between them after that date, which last-mentioned costs are to be certified as payable to the solicitors of the defendant Louis Solomon."

The action was brought in December, 1886, for the administration of the estate of the testator, who died on November 22, 1886, the plaintiffs being beneficiaries under the will.

At the commencement of the action counsel advised that the executors should sever in their defence; and they did so, and appeared by different solicitors. Afterwards it was thought desirable in order to save expense that the same solicitors should represent both executors; and from November 14, 1887, down to November 22, 1892, they were both represented by Messrs. Grover, Humphreys & Son. The defendant Saul Isaac then (as Lindley L.J. said) for some unexplained reason again severed, and down to January 24, 1894, he appeared in person. From the latter date he was represented by Mr. Ernest Bevir as his solicitor.

The notice of appeal asked that, in lieu of the direction given by the learned judge, it might be ordered that the one set of costs should be apportioned by the taxing master between the defendants Louis Solomon and Saul Isaac, and certified as payable to their respective solicitors.

Farwell, Q.C., and *Rowden*, for the appellant. It ought to be left to the taxing master to apportion between the two trustees the one set of costs which is allowed. This is in accordance with the practice of the Court of Chancery when trustees severed in their defence to a suit: Daniell's Chancery Practice (6th ed.), pp. 506, 1208, 1209. A trustee ought not to be deprived of his costs simply because he has severed from his co-trustee in his defence. It must be shewn that there has been misconduct on his part. Severing from a co-trustee is not of itself misconduct. The costs payable out of the estate have not been increased, for only one set of costs has been

allowed. In *Course* v. *Humphrey* (1), where only one set of costs was allowed to trustees, the division between them was left to the taxing master; and this view is adopted in Daniell's Practice. *Attorney-General* v. *Wyville* (2) is to the same effect. The order appealed from establishes an entirely new practice. It was suggested to Kekewich J. that either two sets of costs should be allowed, or that the one set of costs should be apportioned by the taxing master.

A. H. Jessel, for beneficiaries.

Warrington, *Q.C.*, and *Borthwick*, for the defendant Solomon. No part of the costs ought to be taken away from Solomon; his solicitors have really done all the work of the administration. The claims against the estate have been reduced by a large amount, and after this had been done the defendant Isaac thought fit to sever. Wherever only one set of costs is allowed the whole ought to be paid to Solomon's solicitors.

But, in truth, this order is not appealable without leave, and leave has not been given. The costs are in the "discretion of the Court," within the meaning of s. 49 (3) of the Judicature Act, 1873.

The proviso to rule 1 of Order LXV. does not apply here. There is no question of a contractual right to costs. The trustees as a body have not been deprived of their costs out of the trust fund. There is merely a question between the two trustees as to the mode in which the costs allowed out of the fund are to be divided between them. The proviso in rule 1 refers to a claim for costs as against the trust estate. The

(1) (1859) 26 Beav. 402.

(2) (1860) 28 Beav. 464.

(3) Sect. 49: "No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

By Order LXV., r. 1, "Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division. . . ."

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division of the costs was a matter entirely within the discretion of the judge, and the Court of Appeal will not interfere. *Course* v. *Humphrey* (1) does not lay down any absolute rule that the costs are to be apportioned by the taxing master. Provided, however, that Solomon's costs are paid first, he cannot object to any surplus of what is allowed being paid to Isaac.

Farwell, Q.C., in reply. Isaac has been in fact "deprived" of his right to costs out of the trust fund. It does not matter to whom the costs of which he has been deprived go. There is a right of appeal. He does not seek to take anything away from Solomon.

Lindley L.J. The point raised is one of considerable general importance in practice. We should like to consult one of the taxing masters about the practice before we give our judgment.

Cur. adv. vult.

Jan. 22. Lindley L.J. delivered the judgment of the Court (Lindley, A. L. Smith and Rigby L.JJ.) as follows:—The first question is, whether this appeal is competent. [His Lordship referred to the order on further consideration, and continued:—] The appeal is based upon the proviso in rule 1 of Order lxv., which says that "nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

The effect of the order under appeal unquestionably is to deprive the defendant Saul Isaac of all costs subsequently to his severance in 1892. Then arises the question whether there was before the learned judge any evidence to justify the view that the defendant Isaac had "unreasonably instituted or carried on or resisted any proceedings" in relation to the administration of the testator's estate.

(1) 26 Beav. 402.

The defendant Isaac and his co-trustee Solomon in the first instance severed in their defences for what appear to have been good and sufficient reasons. But from November 14, 1887, down to November 22, 1892, the two trustees acted together and were represented by the same solicitors. Then, for some reason which is unexplained, the defendant Isaac again severed from his co-trustee, and afterwards employed a separate solicitor. It seems to us that primâ facie this severance requires explanation. But it would not be just to act upon the view that his conduct was unreasonable without affording the defendant Isaac an opportunity of explaining his conduct. There is no evidence on the subject, and we think it would be going too far to deprive a trustee of his costs simply on the ground that he has severed from his co-trustee in his defence, and without giving him an opportunity of explaining the reasons for his severance, so that the Court may be able to come to a judicial conclusion that the severance was improper. It appears to us, therefore, that the appeal is competent, this not being a case in which the costs were in the discretion of the judge.

We are of opinion that no ground has been shewn for depriving the defendant Isaac of all costs. He asks by his notice of appeal that the one set of costs which has been allowed may be apportioned by the taxing master between the two trustees. But it was pointed out in the discussion which took place before us that the effect of such an order might be to deprive the defendant Solomon of a large amount of costs to which he is justly entitled, as it would give to Isaac a share of the costs incurred in relation to work which Solomon alone had done. Mr. Farwell said that he did not desire this result, but that he only wished that his client should receive costs in respect of the services which he had himself rendered to the estate; and Mr. Farwell said that Isaac had under the direction of the Court got in some of the testator's assets, and that his costs incurred in doing that ought to be given to him and not to Solomon. After considering the matter, and consulting one of the taxing masters, we have come to the conclusion that the order of Kekewich J. should be varied, though

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not exactly in the way which was suggested by Mr. Farwell. We think that the order should be varied by directing that the one set of costs allowed to the two trustees be apportioned by the taxing master between the defendants Solomon and Isaac, but so as to give to Isaac only the costs applicable to the work done by him alone. We will not throw the costs of the dispute between the trustees upon the estate, and therefore no costs of the appeal will be allowed, except that the respondents, other than the defendant Solomon, will take their costs out of the estate.

Solicitors: *Ernest Bevir; Grover, Humphreys & Son; McDiarmid & Teather.*

W. L. C.

C. A. 1897 *Jan.* 29.

In re SIMPSON. *In re* WHITCHURCH.

[1896 S. 1634.]

Settled Land—Trustees—Infant Beneficiary—Sale of Settled Land—Appointment of Colonial Trustees—Form of Order—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 8; *ss.* 38, 59, 60—*Rules under the Settled Land Act*, 1882, *Appendix, Form xix.*

Where an infant domiciled in Australia was entitled under a will to a small share of real property in this country which the co-owners proposed to sell, and in order to effectuate the sale of the infant's interest it was necessary to apply to the Court for the appointment of trustees under the Settled Land Act, 1882, the Court, upon proof that the sale was for the benefit of the infant, appointed two persons domiciled in Australia trustees of the settlement effected by the will for the purposes of the Act.

The form of order in *In re Wright's Trusts*, (1883) 24 Ch. D. 662, followed.

THIS was an appeal from a decision of North J. in chambers.

In this case an originating summons was taken out under the Settled Land Acts, 1882 to 1890, on behalf of Marie W. W. H. Simpson, an infant, by her next friend, in respect of certain shares of freehold and leasehold property in London and Southampton to which she was absolutely entitled (such shares being settled land within the meaning of the Settled

Land Act, 1882, s. 59, by reason of the person entitled thereto being an infant, and the infant being deemed to be tenant for life under that section), asking for the appointment of E. H. Simpson of Nyngan, New South Wales, and P. S. Selfe of Sydney, New South Wales, as trustees under the settlement for the purposes of the above-mentioned Acts.

Mr. Simpson was the father of the infant, and Mr. Selfe was her maternal grandfather.

By his will, dated January 29, 1895, R. J. Whitchurch, then of Nyngan, New South Wales, but formerly of Burstow, Surrey, devised and bequeathed to the infant all his interest under the wills of his aunts, Elizabeth Whitchurch and Margaret Whitchurch, for her separate use, and appointed Mr. Simpson sole executor and trustee of his will. The testator died on the same day.

At the date of his death he was entitled, under the wills of his two aunts, to a twenty-fifth share of certain freehold and leasehold hereditaments in Notting Hill and Southampton, and to a thirtieth share of certain other hereditaments in the same places.

The will was proved in New South Wales and in this country. In order to avoid the necessity of a partition, negotiations were entered into between the relatives of the testator in this country and Mr. Simpson and Mr. Selfe with a view to the sale of the shares of the infant to a co-owner of the testator, and ultimately an agreement for sale was executed in New South Wales by Mr. Simpson and Mr. Selfe. In order to carry out this agreement it was necessary that trustees of the infant's estate should be appointed under s. 60 of the Settled Land Act, 1882, and the present summons was accordingly taken out for that purpose.

It appeared from the joint affidavit of Mr. Simpson and Mr. Selfe that Mr. Simpson and his wife and infant child were permanently domiciled in New South Wales; that in their opinion it was desirable that the property of the infant should be realized and the proceeds remitted to the Colony, where they could be safely invested so as to produce at least 5 or 6 per cent., and where they could be more conveniently applied to

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the benefit of the infant; and that the terms of the sale were beneficial to the infant. Affidavits were also obtained from the Colony as to the fitness of the proposed trustees.

North J., being of opinion that the Court ought not to sanction the sale of an infant's estate to vest the proceeds in colonial trustees with a view to their investment in unauthorized securities, dismissed the summons.

The infant appealed.

Vaughan Hawkins, for the appellant. Sect. 2, sub-s. 1, defines settlement for the purposes of the Act, and that subsection, read in conjunction with s. 59, shews that in this case the will of R. J. Whitchurch is a settlement within the meaning of the Act. Sub-sect. 8 of s. 2 shews who are the trustees of the settlement; and s. 38 provides for the appointment of trustees of the settlement by the Court. There is nothing in either of those sections to exclude colonial trustees.

Sect. 60 provides that the powers of an infant tenant for life, or having the powers of a tenant for life, shall be exercised by the trustees of the settlement.

There being jurisdiction to appoint the proposed trustees, it is for the benefit of the infant that they should be appointed, and that the sale should be carried out and the proceeds invested in the country where the infant resides.

As to the form of the order, in *In re Morgan* (1), the persons proposed to be appointed were appointed trustees under the settlement for the purposes of the Act; in *In re Wright's Trusts* (2) they were appointed trustees of the settlement effected by the will for the purposes of the Act. This summons is framed in accordance with the form in *In re Morgan* (1), which is the form adopted in the Appendix to Rules under the Settled Land Act, 1882 (Form xix.).

LINDLEY L.J. We think that there is jurisdiction to make the order and that it ought to be made. This is eminently a case in which it is for the benefit of the infant that the trustees should be appointed, and that the sale should be carried into

(1) (1883) 24 Ch. D. 114. (2) 24 Ch. D. 662.

effect if there is jurisdiction to do it. We are not in the habit of appointing colonial trustees, and it requires very special circumstances to induce the Court to make such an order. But in this case the infant is resident in Australia, and she has no friends or relatives in this country, and so far as appears is not likely to have any. She is entitled to a small share of real and leasehold property in this country which is divided into a great many shares, and obviously the business-like way of dealing with her interest is to do what we can to facilitate any disposition of the property which will avoid the necessity of a partition; and if the other co-owners wish that the property should be sold to one of themselves to effect this object, it ought to be sold and the proceeds of the infant's share handed over to trustees; and we can see no reason why the proceeds should not be paid to trustees in the Colony.

The order should be that the persons proposed as trustees be appointed trustees of the settlement effected by the will of the testator for the purposes of the Settled Land Act, 1882.

A. L. SMITH and RIGBY L.JJ. concurred.

Solicitor: *George M. Light.*

H. B. H.

CHITTY J.
1896
Dec. 16, 17.
1897
Jan. 13.

LIST *v.* THARP.

[1896 L. 2424.]

London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5 *sub-ss.* 29, 32; *s.* 90 —*Party Structure Notice*—*Adjoining Owner*—*Possession of Premises under Building Agreement.*

The word "owner" in s. 5, sub-ss. 29 and 32, and in s. 90 of the London Building Act, 1894, as therein defined, includes a person who has entered upon land and erected buildings under an agreement for a lease, although no lease has been executed and although the agreement is expressed not to operate as a demise but to give only a right to enter upon the premises for the purpose of performing the agreement.

A person in that position is accordingly entitled as an "adjoining owner" to receive from an adjacent "building owner" the notice and particulars of proposed works required by s. 90 of the Act, and it is not sufficient to give notice to the intending lessor.

Injunction granted, in these circumstances, to restrain a building owner from proceeding with his works without the statutory notice to the intending lessee of the adjoining premises.

MOTION on behalf of the plaintiff to continue an interim injunction, which had been granted, restraining the defendant from heightening a wall dividing his premises from those of the plaintiff.

The plaintiff was a sub-lessee from Sir Charles Oppenheimer, who was the lessee from the Crown under a long lease granted by the Commissioners of Woods and Forests of a piece of land on which certain premises, known as No. 36, St. James' Place, which had been pulled down, had stood; and the defendant was lessee for a term having about eleven years to run of the adjoining premises, No. 37, St. James' Place, holding under a lease granted by a Mrs. Byng.

By an agreement dated December 12, 1894, between Sir Charles Oppenheimer of the one part and the plaintiff of the other part, Sir Charles Oppenheimer agreed to demise the land of which he was lessee to the plaintiff for a term of ninety years, from September 29, 1895, at a rent of 550*l.* a year; and the plaintiff agreed within the time therein specified to erect

buildings upon the land at an expense of not less than 100,000*l*. Clause 6 of the agreement provided that the plaintiff should forthwith upon the signing of the agreement be entitled to possession of the land. Clause 7 reserved to the surveyor and all officers and workmen of the surveyor, and of Sir Charles Oppenheimer acting under the authority of the surveyor, a right to enter upon the land at all times during the erection of the buildings for the purpose of examining the same, and otherwise as therein mentioned. By clause 18 it was stipulated that nothing in the agreement should be construed into a demise at law of the premises so as to vest any estate in the plaintiff, but that he should only have a right to enter upon the premises for the purpose of performing the agreement. The agreement further made the production of a certificate signed by the architect of the commissioners a condition precedent to the granting of the lease.

Pursuant to the agreement the plaintiff entered upon the land, and proceeded to erect the buildings thereon. The defendant, as the building owner of the adjoining premises, No. 37, St. James' Place, being desirous of executing certain works on the wall dividing his premises from those of the plaintiff, in February, 1896, gave to Sir Charles Oppenheimer the notices required by s. 90 of the London Building Act, 1894, by which it is enacted that "a building owner shall not except with the consent in writing of the adjoining owner and of the adjoining occupiers . . . . exercise any of his rights under this Act in respect of any party fence wall unless at least one month or exercise any of his rights under this Act in relation to any party wall or party structure other than a party fence wall unless at least two months before doing so he has served on the adjoining owner a party wall or party structure notice stating the nature and particulars of the proposed work and the time at which the work is proposed to be commenced"; but the defendant omitted to give any such notice to the plaintiff.

The defendant, as building owner, obtained, in July, 1896, in the manner prescribed by the Act, an award in his favour in an arbitration between Sir Charles Oppenheimer and himself,

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and thereupon commenced to execute the works specified in the notice.

At the date of the award the plaintiff had erected the buildings stipulated for by the agreement, but no lease had at that time been granted to him. The lease was subsequently granted to him on August 4, 1896.

One of the questions on the hearing of the motion was whether the wall in question was a "party fence wall" or a "party-wall or party structure"; but the principal question was whether the defendant was bound, before commencing the work on the wall, whether "party fence wall" or "party-wall," to give notice to the plaintiff under s. 90 of the Act as being an "owner" within the meaning of s. 5, sub-ss. 29 and 32, of the Act. Sub-s. 29 is as follows: "The expression 'owner' shall apply to every person in possession or receipt of the whole or of any part of the rents or profits of the land or tenement, or in the occupation of any land or tenement otherwise than as a tenant from year to year or for any less term or as a tenant at will."

Sub-s. 32 is as follows: "The expression 'adjoining owner' means the owner or one of the owners and 'adjoining occupier' means the occupier or one of the occupiers of land buildings storeys or rooms adjoining those of the building owner."

Byrne, Q.C., and *R. Cunningham Glen*, in support of the motion. The plaintiff was in possession of the land under clause 6 of the agreement. Under that clause he was entitled to the possession, and when he entered on the land he was lawfully in possession, and he was an adjoining owner within the meaning of sub-s. 29 of s. 5 of the Act, and as such adjoining owner was entitled to notice under s. 90 of the Act; and the defendant, as "building owner," had no right to interfere with the party-wall until he had given the plaintiff the notice required by the Act: *Fillingham* v. *Wood* (1); *Caudwell* v. *Hanson*. (2)

[CHITTY J. referred to *Beddington* v. *Atlee*. (3)]

(1) [1891] 1 Ch. 51. (2) (1871) L. R. 7 Q. B. 55.
(3) (1887) 35 Ch. D. 317.

Levett, Q.C., and *Christopher James*, for the defendant. The plaintiff was not an adjoining owner within the meaning of sub-s. 29 of s. 5. He was a mere licensee under Sir Charles Oppenheimer; he was in possession only for the purpose of erecting the buildings, and, his possession being thus limited, he was not in possession within the meaning of the definition in the Act. As the lease was granted to the plaintiff before the work on the wall was actually begun, his rights became merged in the lease, and he was in no better position than Sir Charles Oppenheimer. We submit that the notices served on Sir Charles were sufficient under the Act, and that we were not bound to serve them on the plaintiff; and, putting aside for the time the question as to whether the wall in question was a "party fence" wall or a "party-wall or party structure," the interim injunction ought not to be continued.

Byrne, Q.C., in reply.

Cur. adv. vult.

1897. Jan. 13. CHITTY L.J. (1) The question is whether the defendant was bound before commencing the work on the wall in controversy to give notice to the plaintiff under the London Building Act, 1894. It turns on sub-s. 29 of the 5th section, which enacts that unless the context otherwise requires: [His Lordship read the sub-section, and, after stating the facts as above set out, proceeded:—]

Now, regard being had to the statutory definition of the expression "owner," the first inquiry is whether the plaintiff was, in February, 1896, in possession of the land. It appears to me that the only answer must be that he was. Clause 5 of the agreement is precise; he was entitled to the possession, and, having entered upon the land, he was lawfully in possession accordingly. The reservation in the 7th clause of a right of entry for the surveyor and others during the erection of the buildings shews that the term "possession" is used in the 6th clause in its ordinary sense: the power is reserved as against the plaintiff's possession. It was argued that he was in possession

(1) The learned judge had been appointed a Lord Justice of the Court of Appeal since the hearing of the case.

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only for the purpose of erecting the buildings, and, consequently, that as his right to possession was thus limited, he was not in possession within the meaning of the definition in the Act. But I cannot accept this argument. A man is not the less in possession because as between himself and the person from whom he receives it, he is under a contractual obligation to use the property for some particular purpose; as, for instance, when he is under covenant to use a house for the purpose of a private dwelling-house only.

The next inquiries are whether the plaintiff was in occupation of the property "as a tenant from year to year, or for any less term, or as a tenant at will." Here, again, the agreement itself supplies the answer: nothing in the agreement was to be construed into a demise at law or to vest any estate in the plaintiff. Consequently he was not tenant from year to year, or for any less term; nor was he tenant at will. The provision in clause 18 of the agreement that he was only to have the right of entry for the purpose of performing the agreement, I have already dealt with incidentally. It cannot, in my opinion, be made use of for the purpose of cutting down the right to the possession which was previously imposed by express terms. After his entry on the land he was in possession as between himself and Sir Charles Oppenheimer, though he was bound by the contract as to the user of the land. And as against strangers he had all the ordinary rights and remedies incidental to possession.

It was further argued for the defendant that, inasmuch as the plaintiff had taken his lease before the work on the wall was actually begun, and as the prescribed notices had been given to Sir Charles Oppenheimer, the plaintiff was in no better position than Sir Charles, and, accordingly, was not in a position to insist on the notices being given to himself. In substance this argument was that the plaintiff's rights had become merged in the lease. In my opinion this argument is not sound. As between himself and the defendant, I think that, notwithstanding the lease, the plaintiff is entitled to refer his title back to the agreement under which he had possession at the time, and that the question between him and the defendant is not affected by any doctrine of merger.

I see no reason for questioning the conclusion arrived at in *Beddington* v. *Atlee*. (1) The plaintiff in February, 1896, had, by virtue of the building agreement, an equitable interest of great value in the land and the buildings which he had thereon erected.

Such being my opinion, it becomes unnecessary to decide at the present stage of the proceedings any question as to the character of the wall, whether it was a party-wall or a party fence wall in the whole or in part.

Solicitors: *W. H. Southern; Stibbard, Gibson & Co.*

(1) 35 Ch. D. 317.

G. M.

NORTH J.

1896

Dec. 19.

COOK *v.* ANDREWS.

[1896 C. 3862.]

Vendor and Purchaser—Purchaser let into Possession before Completion—Failure to pay Moneys due under Agreement—Action by Vendor for Rescission of Agreement—Motion that Purchaser give up Possession in Default of making Payments due under Agreement—Appointment of Receiver.

An agreement for the sale of a leasehold interest in land provided that possession should be given to the purchaser on payment of a specified part of the purchase-money, he undertaking to pay the rent and other outgoings, and also, on taking possession, paying to the vendor the cost of a new fence. The specified part of the purchase-money having been paid, the purchaser was let into possession, but he failed to pay the cost of the fence and did not pay the rent and taxes, so that the vendor had to pay them in order to prevent the forfeiture of the lease. The vendor commenced an action for rescission of the agreement on the ground that he had been induced to enter into it by misrepresentation, and moved in the action for an order on the defendant to deliver up possession of the land in default of his making the payments due under the agreement :—

Held, that the motion, seeking in effect the specific performance of some of the terms of the agreement, was inconsistent with the claim for rescission made by the writ, and must therefore be refused.

But a receiver was appointed for the purpose of securing the payments in question.

Motion by the plaintiff that the defendant might be ordered forthwith to deliver up to the plaintiff possession of a piece of land situate at Kensal Rise, the subject-matter of an agreement dated January 20, 1896, between the plaintiff and the defendant, in default of the defendant repaying to the plaintiff, within a time to be fixed by the Court, in pursuance of clause 4 of the agreement, the sum of 74*l.* 18*s.* 11*d.*, which the plaintiff had since the date of the agreement paid for rent and outgoings, which ought to have been paid by the defendant, and the sum of 67*l.*, payable to the plaintiff under clause 10 of the agreement.

The action was brought for the rescission of the agreement, on the ground that the plaintiff had been induced to enter into it by misrepresentations made by the defendant. The writ was indorsed simply with a claim for rescission of the agreement, possession of the land, damages and costs.

The agreement of January 20, 1896, was made between Richard Cook (the plaintiff), called the vendor, of the one part, and Walter Andrews (the defendant), called the purchaser, of the other part. It contained a recital that the vendor had agreed with the purchaser to sell his leasehold interest in the land, held under a lease dated December 22, 1890, and that a company had been formed, under the title of the Universal Sports and Recreation Society, Limited, for the purpose of acquiring the land from the purchaser, and for the holding of exhibitions, &c., with a nominal capital of 100,000*l.* And it was agreed (inter alia) as follows:—

1. The vendor agreed to sell and the purchaser agreed to purchase at the price of 16,000*l.* the land in question, containing about 20 acres, then vested in the vendor under the beforementioned lease for the unexpired term of 14½ years from September 29, 1895, subject to the yearly rent of 104*l.* (increasing thereafter to 124*l.*) and to the covenants and conditions contained in the lease.

"3. The purchase-money of 16,000*l.* is to be paid either wholly in cash, or, at the option of the purchaser, as follows (that is to say) 1000*l.* in cash on the company going to allotment on or before the 1st February next; 12,000*l.* in shares of the company within one month of the company going to allotment; and 3000*l.* further in cash 18 months hence (that is to say) on the 20th July, 1897, or at any time before that date at the discretion of the purchaser or the owner for the time being of the benefit of this agreement. Time shall be deemed to be of the essence of the contract, and immediately on the payment of the said 3000*l.* in cash the purchase shall be complete; nevertheless the provisions of this clause are subject to and without prejudice to the rights of the vendor as set out in clause 9 herein contained.

"4. It is hereby agreed that after giving possession, and until payment of the said 3000*l.* and receipt by the vendor of the said shares, the amounts thereof shall remain as a first charge or lien upon the land in favour of the vendor. And the purchaser will pay all rent and outgoings, and observe and perform all the covenants of the said lease, and hold the vendor

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harmless and indemnified, from the day of possession being given, as if an assignment of the lease had been duly executed."

"6. Vacant possession shall be given to the purchaser of the said land (without prejudice to the powers and rights conferred upon the vendor by law and by virtue of clause 9 of these presents) on payment of the before-mentioned sum of 1000*l.* and allotment to and receipt by the vendor of the said 12,000*l.* in shares (subject to the right of the vendor to remove the stack of hay now standing on the land and to the present underlettings to football clubs and others if any), but the purchaser shall have the benefit of all rents accruing, which shall be apportioned as on the date of the payment of the said sum of 1000*l.*, the purchaser on his part undertaking to pay all outgoings from the same date, or a proportionate part (if any) which may be accruing."

"9. In the event of the purchaser failing to pay the before-mentioned sum of 1000*l.* (whether the said company shall have gone to allotment or not) to the vendor in cash on or before the 1st February next (and in this respect time shall be of the essence of the contract) this agreement shall be absolutely null and void, and if the said shares are not allotted to the vendor as aforesaid, or if the aforesaid sum of 3000*l.* shall not be paid to the vendor on or before the 20th July, 1897, as aforesaid (and in this respect time shall also be of the essence of the contract), the said sum of 1000*l.* (if then already paid) shall be absolutely forfeited to the vendor as and by way of liquidated and ascertained damages, and the vendor shall be at liberty to re-enter and take possession of the said premises and all buildings, erections, and fixed materials and plant thereon, without making to the purchaser any compensation or allowance in respect thereof (but such right of re-entry shall be deemed a cumulative remedy), and this agreement shall thereupon absolutely cease, but without prejudice to any right of action or other remedy of the vendor for the recovery of any moneys due to him by the purchaser at the time of re-entry, or in respect of any breach by the purchaser of this agreement, and in case of re-entry under this present clause all moneys paid by the purchaser may be treated as forfeited to the vendor.

"10. Upon the taking possession as aforesaid the purchaser shall pay to the vendor, in addition to the sum of 1000*l.*, the cost of the new fence now being erected by him, and in case of difference the amount to be so paid shall be ascertained by two valuers or their umpire in the usual way."

The company was registered on December 13, 1895, with a nominal capital of 100,000*l.* On March 23, 1896, the deposit of 1000*l.* was paid by the defendant to the plaintiff, and certificates for 12,000 fully paid-up shares of 1*l.* each in the company were handed by the defendant to the plaintiff; and the plaintiff on the same day delivered formal possession of the land to the defendant as from February 8, 1896. The defendant shortly afterwards let the company into possession of the land; but in July, 1896, he resumed possession, and had since continued in possession. On August 5, 1896, an order was made to wind up the company; and on August 31 a receiving order in bankruptcy was made against the defendant, but he had not yet been adjudged a bankrupt. Leave to commence this action had been given by the Court in Bankruptcy.

The plaintiff deposed that he delivered possession of the land to the defendant on the faith of his promise that he would pay for the fencing of the land and would make the other payments for rent and other outgoings as provided by the agreement; but the defendant had failed to make these payments, and, in addition to paying 67*l.* for the fencing, the plaintiff had been compelled, in order to prevent a forfeiture of the lease, to pay rent and other outgoings, amounting in all to 74*l.* 18*s.* 11*d.*

Swinfen Eady, Q.C., and *O. L. Clare*, for the plaintiff. A purchaser of land is not entitled to retain possession of the land before completion of the contract, if he does not comply with the conditions upon which possession was given to him under the contract. The Court will order him to elect between the two alternatives—to give up possession or to fulfil the stipulations of the contract: *Lewis* v. *James* (1); *Cooper* v. *London, Chatham and Dover Ry. Co.* (2); *Greenwood* v. *Turner.* (3)

(1) (1886) 32 Ch. D. 326, 330. (2) (1866) 14 W. R. 985.
(3) [1891] 2 Ch. 144.

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[NORTH J. The plaintiff is suing for rescission of the contract. How can he in such an action consistently ask for an order in effect that the defendant shall specifically perform a part of the contract?]

The defendant is insisting on the validity of the contract, and cannot be heard to say that he is not to perform it. He cannot approbate and reprobate. The plaintiff is willing to pay the 1000*l.* which he has received into court. The defendant has imperilled the forfeiture of the lease for breach of covenant.

[NORTH J. You may perhaps be entitled to the appointment of a receiver.]

The plaintiff is willing to amend his notice of motion and ask for a receiver.

Eustace Smith, for the defendant. The appointment of a receiver would be equivalent to giving possession to the vendor in another form.

[NORTH J. I do not see how you can remain in possession and jeopardize the property.]

The plaintiff is not entitled to a receiver unless by contract he is entitled to possession.

NORTH J. In my opinion this action stands in an entirely different position from an action for the specific performance of a contract. It is said that the defendant is not entitled to retain possession of the land, while at the same time he does not fulfil the terms of the agreement under which possession was given to him. I do not think that the plaintiff is entitled to turn the tables on the defendant in that way. I must look at the case made by the writ, which simply claims rescission of the agreement. That being so, I do not think the plaintiff is entitled to claim the specific performance of any of the stipulations of the agreement. I do not think that he can insist on the defendant's performing an agreement which he himself asserts he is not bound by, and is seeking to get rid of. But, whatever his rights may be, I think the plaintiff is entitled to have the property preserved from forfeiture by payment of the rent and the rates and taxes, and for this reason I allow the notice of

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motion to be amended by asking for the appointment of a receiver. I will appoint a receiver for the purpose of receiving all moneys arising from the land, but only so far as is necessary to provide for the payment to the plaintiff of the sums mentioned in the notice of motion, the rates and taxes now due, and the rates and taxes and other outgoings accruing due; but, subject to that, the receiver is not to interfere with the possession of the defendant.

Solicitors: *Birchalls; Harold A. Farman.*

W. L. C.

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FLETCHER *v.* NOKES.

[1896 F. 471.]

Landlord and Tenant—Forfeiture—Breach of Covenant—Notice of "Particular Breach"—Sufficiency of Notice—Action to recover Possession—Damages—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

The notice to be served by a lessor on his lessee, under s. 14, sub-s. 1, of the Conveyancing Act, 1881, "specifying the particular breach of covenant complained of," to entitle the lessor to enforce by action a right of re-entry for the breach, must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought.

A mere general notice of breach of a specified covenant is not sufficient.

A notice by a lessor to his lessee that "you have broken the covenants for repairing the inside and outside of the houses" (describing them) contained in a specified lease:—

Held, to be insufficient, and on this ground an action by the lessor to recover possession of the demised houses for breach of covenant was dismissed with costs:

Held also, that the lessor could not maintain the action for damages for the breach.

TRIAL of action by a lessor against his lessee to recover possession of the demised premises, on the ground of breach of covenant by the lessee. The plaintiff also claimed mesne profits and damages for the breach.

By an indenture dated June 7, 1886, the plaintiff demised to the defendant, his executors, &c., six houses situate at

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Stratford, in Essex, for the term of thirty-five years, from Midsummer, 1886, at a yearly rent of 42*l.* And the defendant covenanted with the plaintiff (inter alia) that he would during the term keep the premises in good condition and complete tenantable repair, ... and at the expiration or sooner determination of the term so yield up the same unto the lessor, his executors, &c. The lease contained a proviso for re-entry by the lessor on any breach of any of the covenants by the lessee therein contained. The plaintiff held the houses under a superior lease.

On January 8, 1896, the plaintiff served upon the defendant personally a notice in writing as follows:—

"I hereby give you notice that you have broken the covenants for repairing the inside and outside of the houses, Nos. 10, 11, 12, 13, and 14, River Street, High Street, Stratford, in the county of Essex, and No. 7A, Lea Street, Stratford, also in the county of Essex, contained in a lease of the said premises, dated the 7th day of June, 1886, and made between myself of the one part and yourself of the other part. And I require you to repair the said houses in accordance with the said covenants forthwith, and to pay forthwith to me 20*l.* as compensation for such breach of covenant, and for the expenses which have been incurred by me for surveyors' fees and solicitors' charges by reason of such breach of covenant as aforesaid. And I hereby give you further notice that if you make default in remedying such breach of covenant in manner above mentioned, or in making the compensation hereby required, I will enter and take possession of the said messuages, dwelling-houses and premises, but without prejudice to any other remedies which I may have by reason of such default.

"Dated the 27th day of December, 1895."

The defendant did not comply with this notice, and on March, 27, 1896, the writ in this action was issued.

By his defence, the defendant denied that he had committed any breach of covenant, and he also said that the notice was not a sufficient compliance with s. 14 of the Conveyancing Act, 1881, in that it did not specify the particular breach of covenant complained of.

Swinfen Eady, Q.C., and *Mulligan*, for the plaintiff. The notice which has been served on the defendant is a sufficient notice under s. 14, sub-s. 1 (1), of the Conveyancing Act, 1881.

It is not necessary to give any further details of the breach. See Woodfall's Landlord and Tenant, 15th ed., App. C. 15, p. 991.

Edward Clayton, for the defendant. The notice is not sufficient. The form given in Key and Elphinstone's Conveyancing Precedents (5th ed.), vol. ii. p. 258, No. xviii., is much more specific. This notice is not "a notice specifying the particular breach complained of," and that is what is required by s. 14, sub-s. 1. This notice would not enable the lessee to remedy the breach before action brought for forfeiture.

Mulligan, in reply. Sect. 14, sub-s. 1, requires that the notice should specify "the particular breach complained of" —not "particulars of the breach complained of." It is not necessary to specify the acts or defaults which go to make up the breach.

NORTH J. In my opinion this notice of breach of covenant is not a sufficient notice within s. 14. I am surprised to find that no case has been cited in which this question has arisen for decision, for a good many cases arising out of notices under this section have come before the Courts. But the point appears to be a new one, and I must deal with it as such. [His Lordship referred to the provisions of the lease and to the notice, and continued :—]

Is this a sufficient notice of breach? There is nothing in it to indicate in which of the houses the default has been made, or whether it has been made in all of them. The main ground of

(1) Sect. 14: "(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

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my conclusion that the notice is insufficient is this. Suppose that s. 14 had not been passed, and the previous law had remained in operation, and the landlord had brought an action against the tenant for breach of covenant, the first thing which the landlord would have been compelled to do would have been to give particulars of the breaches on which he relied, in order that the tenant might know what he had to meet. I think that s. 14 was intended to place the tenant in a better position than he was in before. He was to have the option of doing, before action brought, all those things the neglect of which would have been the ground of relief against him if s. 14 had not been passed. It is impossible to suppose that the tenant was intended to be before action in a worse position, with respect to alleged breaches, than he would formerly have been in after action. I think the notice which is to be given under s. 14 ought to be such a notice as will enable the tenant to understand with reasonable certainty what it is which he is required to do. I do not mean that the landlord need go through every room in a house and point out every defect. But the notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him. In my opinion, the notice which the plaintiff has given to the defendant is not sufficiently specific. Sect. 14 says that it is to be a notice "specifying the particular breach complained of." I do not think that is met by a notice which simply says, "You have broken the covenants for repairing." The plaintiff has not condescended upon any details, and, in my opinion, the notice is not sufficient under s. 14.

Mulligan. The plaintiff is still entitled to damages for the breach, and the action should not be dismissed. Sect. 14 applies only to an action to enforce a right of re-entry or forfeiture.

NORTH J. In my opinion the notice is a condition precedent to the bringing of this action. The statement of claim seeks

relief, really, on the ground of forfeiture, and nothing else. A general claim for 150*l.* damages is added: but no particulars have been given—and I cannot try an issue as to the state of repair of each portion of every house. This action must be dismissed, with costs.

Solicitors: *E. J. Moeran; Stanley Evans & Co.*

W. L. C.

STIRLING J. 1896 July 21; Nov. 17.

In re MANCHESTER AND MILFORD RAILWAY COMPANY.

Railway Company—Judgment against—Execution—"Action on a Contract"—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

The M.-W. Railway Company and the M. Railway Company were each of them authorized to make a separate line in a certain district to a point of junction with an existing railway belonging to the L. Company. In order to save expense the three companies in 1861 entered into an agreement whereby the L. Company was to make a joint line to be used by the other two companies, and a joint station to be used by the three companies. This arrangement was embodied and carried into effect by an Act of Parliament passed in 1862, which contained provisions for the payment of certain sums to the L. Company by the two other companies, and for the recovery of those sums by action in case of default. The works were duly executed by the L. Company. The M. Company from time to time made default in their payments; and the L. Company in 1883 and at subsequent dates obtained various judgments against them, which were unsatisfied.

Upon an application by the L. Company for leave to issue execution upon the rolling-stock of the M. Company:—

Held, that the actions in which the judgments had been recovered were not "actions on a contract" within the meaning of s. 4 of the Railway Companies Act, 1867, and that consequently the applicants were not entitled to issue execution.

The observations of Lord Watson in *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners*, (1882) 7 App. Cas. at p. 707, commented on and explained.

ADJOURNED SUMMONS.

This was an application on behalf of the Cambrian Railway Company for leave to issue execution in respect of ten debts due on judgments recovered against the Manchester and Milford Railway Company at various dates from May 19, 1883, to June 28, 1895, on the rolling-stock and other chattels of the company; or, in the alternative, for a declaration that the applicants were entitled to a charge on the rolling-stock and other chattels in respect of the judgment debts, and that a proper sum might be fixed and paid by the receiver for the use and occupation of the rolling-stock and chattels.

In 1860 there were three railway companies authorized to make lines of railway to stations in Llanidloes, in Wales, namely,

the Llanidloes and Newtown Railway Company, the Mid-Wales Railway Company, and the Manchester and Milford Railway Company; and the projected lines of the Mid-Wales Company and the Manchester and Milford Company as they approached Llanidloes ran parallel and close to each other. To avoid unnecessary expense an arrangement was come to whereby, instead of two separate and distinct lines being made by the Mid-Wales Company and the Manchester and Milford Company over that portion of their proposed route which was nearly coincident, a joint line should be made there for their use by the Llanidloes Company, and a joint station at Llanidloes for the use of the three companies should also be made by the Llanidloes Company.

Accordingly, an agreement for the above purposes, dated October 26, 1861, was made and executed by the three companies, providing in effect that the Llanidloes Company should construct the joint line and joint station, and that the Mid-Wales Company and the Milford Company should have the right to use the same, and should each pay the Llanidloes Company 5 per cent. per annum on one-third of the cost of the station, and 5 per cent. per annum on one-half of the cost of the joint line, together with a pro ratâ proportion of the cost of maintenance; and it was thereby agreed that each of the three companies should join in doing all that was necessary to obtain the authority of Parliament to carry out this arrangement.

This arrangement was embodied in and sanctioned by an Act passed on July 17, 1862. It contained provisions for the execution and maintenance of the works in question by the Llanidloes and Newtown Company (thereinafter called "the company"), and further enacted as follows:—

Sect. 27: "From and after the time of the opening of the joint line for public traffic the Mid-Wales Company and the Milford Company shall pay half-yearly to the company interest at the rate of 5*l.* per centum per annum on the amount actually expended by the company upon the joint line, including in such expenditure the amount paid by the company for the costs of this Act, and any money repaid by the company under the

STIRLING J. provisions of this Act for land or works taken or executed by the Mid-Wales Company or the Milford Company between Llanidloes and Penpontbren, and the Mid-Wales Company and the Milford Company shall also forthwith after the end of each and every half-year after such opening repay to the company the amount actually expended by them in the then previous half-year in maintaining the joint line, and the said interest and other payments shall be due from and paid by the Mid-Wales Company and the Milford Company in moieties; and if those companies or either of them shall make default in payment of the moiety of such interest or other payments due from each of them respectively, after demand shall have been made by the company for payment thereof, such moiety may be recovered by the company from the company making such default in any county or other court having by law cognizance of the action. . . ."

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Sect. 30 contained similar provisions as to the payment by the same two companies, after the opening of the joint line and joint station, of interest at the rate of 5*l.* per centum per annum on one-third of the amount actually expended by the Llanidloes and Newtown Company upon the joint station and the works and conveniences connected therewith; and for the repayment half-yearly to the Llanidloes and Newtown Company of one-third of the amount actually expended by them in the then previous half-year in maintaining the joint station and the works and conveniences connected therewith, and in payment of officers and servants employed thereat for the joint purposes of the companies entitled to the use of the joint station, and for the recovery of these payments upon default of either of the two companies.

The line and station were duly constructed by the Llanidloes and Newtown Company, whose undertaking and rights had since become and were now vested in the applicants, by whom the joint station had been maintained.

The Manchester and Milford Company had never completed their line so as to be in a position to use, and had never used the line and station so constructed; but it had been decided by the Queen's Bench Division in an action brought by the

Cambrian Company against the Manchester and Milford Company that the Manchester and Milford Company were nevertheless bound to make the payments provided for by ss. 27 and 30 of the Act of 1862; and the judgments mentioned in the summons had been recovered in respect of the arrears of such payments. On July 23, 1875, upon the petition of certain judgment creditors of the Manchester and Milford Company, a receiver of the undertaking was appointed under the Railway Companies Act of 1867. Subsequently, on April 14, 1880, on the application of the Cambrian Railway Company, a manager and receiver was appointed (1), in whose hands the undertaking still remained.

In 1876 the present applicants applied for an order directing the receiver to pay the sums then due under s. 27 of the Act of 1862; but the application was refused, first by Hall V.-C. and then by the Court of Appeal, on the ground that though the sums asked for were debts due by the Manchester and Milford Railway Company they did not constitute "working expenses" within the meaning of s. 4 of the Railway Companies Act, 1867.

The present application was for leave to issue execution against property in the hands of the manager and receiver as an officer of the Court; and the question was whether s. 4 of the Act of 1867 (2) had deprived the applicants of the right to issue such execution.

At the hearing it was admitted that, though the summons was expressed to be in the alternative, the strict rights (if any) of the applicants were according to the first alternative; but it was stated that they were willing to accept relief (if entitled to any) in accordance with the second.

(1) See 14 Ch. D. 645.

(2) Sect. 4 of the Railway Companies Act, 1867, provides as follows: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the first day of September, 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act. . . ."

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Hastings, *Q.C.*, and *G. Cave*, for the Cambrian Railway Company. These judgments were recovered in actions under a contract made before the date of the Railway Companies Act, 1867, and the applicants, therefore, are not prohibited by s. 4 of that Act from issuing execution. It will be argued that there was no contract at all, but rather a statutory obligation; but in *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (1) it was held that statutory provisions of this nature must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the Legislature.

Buckley, *Q.C.*, and *F. C. Norton*, for the Manchester and Milford Railway Company. The heads of agreement do not constitute a contract, and they can only be read in order to construe the Act of 1862. That Act does not turn the document of October 26, 1861, into a binding contract. The Act itself has not the incidents of a contract. The parties could not vary it, nor could they bring an action for rescission. Moreover, no Statute of Limitations would apply to it. The case comes within the prohibition of s. 4.

STIRLING J., after stating the facts, and referring to s. 4 of the Act of 1867:—I read that section as prohibiting the issue of execution in two classes of cases only, namely, (1.) where the judgment is recovered in an action on a contract entered into after the passing of the Act; (2.) where the judgment is recovered in an action not on a contract commenced after the passing of the Act (August 20, 1867). It lies, therefore, with those who say that the issue of execution is prohibited to shew that the judgment falls within one or other of those two classes of cases. On behalf of the Manchester and Milford Company it is said that the actions in which these judgments were recovered were actions "not on a contract" within the meaning of the Act. On the other hand, the applicants contend that these actions were brought on a contract, namely, that constituted by the private Act of Parliament passed on July 17, 1862, a date prior to the passing of the Railway Companies Act, 1867.

(1) 7 App. Cas. 694.

I think that under the terms "action on a contract" and "action not on a contract," as used in s. 4 of the Act of 1867, the Legislature intended to include every kind of action. If, then, the actions on which these judgments were recovered do not fall within the first class of cases, they fall within the second, all of them having been commenced subsequent to the passing of the Act of 1867. The question then is, Were these actions "actions on a contract"?

Now at the date when the arrangement embodied in the deed of October 26, 1861, was made these companies had no power to enter into a contract to any such effect as therein expressed. The arrangement of 1861 was ultra vires of the three companies, and the heads of agreement in which it was embodied, though under the seals of the three companies, could not give rise to any rights as between them, and did not constitute a contract between them. The rights and obligations of the several companies depend entirely on the Act of Parliament. That Act does not purport to ratify or make binding on the companies the heads of agreement. It empowers (ss. 11, 12) the Llanidloes and Newtown Railway Company to construct certain works; it then by ss. 27 and 30 confers on the same company upon constructing and maintaining those works a right to receive from the Manchester and Milford Company certain payments, and imposes on the Manchester and Milford Company an obligation to make those payments, and those payments are expressly made recoverable by action.

The Act therefore imposes a liability on the Manchester and Milford Railway Company, and gives to the predecessors of the Cambrian Railway Company a remedy in respect of that liability by action. The Manchester and Milford Railway Company was, no doubt, willing that the liability should be imposed, but had no capacity to enter into a contract to that effect. Moreover, the liability becomes absolute, not upon the Manchester and Milford Railway Company doing any act whatever, but simply upon certain things being done by the Llanidloes and Newtown Railway Company, the predecessors of the Cambrian Company. It seems to me under those

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circumstances that the action to enforce the liability is not an action on a contract, but an action on a statute.

It is no doubt true that there are cases in which "a statute enables an action to be brought, which nevertheless is not an action on the Act of Parliament": per Maule J. in *Cork and Bandon Ry. Co.* v. *Goode.* (1) An illustration is afforded by the case of *Tobacco-Pipe Makers' Co.* v. *Loder* (2), which was brought to recover a penalty under a by-law from the defendant, who was a member of the plaintiff company. The by-law was made under powers contained in a Royal Charter incorporating the company, and it was contended that the right to recover was under the charter so as to be a special and not a simple contract debt; but it was held that the defendant had incurred the liability to the penalty by becoming a member of the company, and thus impliedly contracting to fulfil the obligations imposed by the by-laws on the members of the company. If the by-law had been made under the power conferred by statute, the result would, I apprehend, have been the same. If in the present case it had been necessary, in order that the Manchester and Milford Railway Company should incur liability, that that company should do some act, as, for example, use the joint line or station, then there would have been much ground for contending that the case fell under the principle of the *Tobacco-Pipe Makers' Co.* v. *Loder* (2); but the decision of the Queen's Bench Division shews conclusively that the liability of the Manchester and Milford Railway Company became absolute without any act on the part of that company.

For the applicants reliance was placed on the case of *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (3), in which it was said, by Lord Watson (4), that a statutory provision such as was found in a particular section of the private Act of Parliament there under consideration must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the Legislature. The section there under consideration conferred a benefit on a private person whose estates were affected by the works thereby

(1) (1853) 13 C. B. 826, 835.
(2) (1851) 16 Q. B. 765.
(3) 7 App. Cas. 694.
(4) Ibid. 707.

authorized. Whether the same principle applies to a case such as the present, where the Legislature is modifying statutory rights conferred on public companies, may require further consideration. In any case, it appears to me that this language does not mean that such enactments constitute contracts for all purposes. I think it means simply that for certain purposes (e.g., the ascertaining the legal effect of such clauses and the nature of the rights conferred by them) enactments of this kind are to be treated as if they were contracts. I cannot look upon that language as authorizing me to hold that these actions are "actions on a contract" within the meaning of s. 4 of the Act of 1867.

In my judgment, therefore, the actions in question were not actions on a contract within the meaning of s. 4 of the Act of 1867, and the application must be refused.

[An appeal from this decision came on for hearing in January, 1897, but was not opened, and was accordingly dismissed.]

Solicitors for applicants: *Le Brasseur & Oakley, for H. C. Corfield, Oswestry.*

Solicitors for respondents: *Young, Jones & Co.*

G. A. S.

STIRLING J.

1896
Dec. 17, 18.
1897
Jan. 13, 19.

In re POMEROY & TANNER, Solicitors.

[1896 P. 1022.]

Solicitor and Client—Bill of Costs—Taxation—Country Solicitor and London Agent—Charges of London Agent—Solicitors Act, 1843 (6 & 7 *Vict.* c. 73), *s.* 37.

Where a country solicitor employs a London agent he ought to incorporate in his bill of costs the details of the charges of the London agent, and until the details of such charges are stated, either in the original or a supplemental bill, there is no complete bill capable of taxation so as to entitle the solicitor to rely upon its delivery for twelve months as a ground for refusing taxation.

This was an application to tax two bills of costs delivered by Messrs. Pomeroy & Tanner, solicitors of Bristol. The facts were as follows:—

The applicant was the sole surviving executor of the will of Henry Sampson, who died on November 7, 1887. In April, 1888, he employed Mr. Pomeroy to act as his solicitor in relation to the winding up of the testator's estate. Mr. Pomeroy's employment in that capacity continued down to November, 1891, when he went into partnership with Mr. Tanner, and from that time the applicant employed Messrs. Pomeroy & Tanner as his solicitors. In May, 1894, the executorship affairs were finally wound up, and thereupon the applicant asked for delivery of the bills. On January 25, 1895, Messrs. Pomeroy & Tanner delivered a bill of costs for 283*l.* 11*s.* 8*d.* commencing on May 31, 1892, and also a cash account relating to the same period. The work done previously to that date, which was work done by Mr. Pomeroy alone, was not included in that bill. In the course of their joint employment Messrs. Pomeroy & Tanner had occasion to employ a London agent. The last item of the bill related to the charges of the London agent and was as follows: "Paid agent's charges (including disbursements, counsel's fee, court charges, &c.) in the dispute and subsequent action against Messrs. Mann and Miss F. A. Sampson and the compromise thereof, 54*l.* 8*s.* 8*d.*" No further step was taken with reference to that bill until February, 1896,

when Messrs. Pomeroy & Tanner threatened to sue for the balance appearing on the bill and cash account. Thereupon the applicant consulted his present solicitor, Mr. H. King of Bristol, and that resulted in an application being made for delivery of the bill of Mr. Pomeroy alone and a cash account from the beginning of the transactions. Accordingly, on April 1, 1896, Mr. Pomeroy delivered certain bills and cash accounts relating to the period during which he acted as sole solicitor, and also a bill of the charges of his London agent during the period covered by the bill delivered on January 25, 1895.

Application was made in the common form for taxation of the bills which had been delivered on April 1, with the exception of that comprising the charges of the London agent; and on April 29, 1896, an order was made upon that application. On May 1, 1896, the present special application was made with reference to the bill delivered on January 25, 1895, and the London agent's bill.

Hastings, Q.C., and *E. Ford*, for the applicant. The old rule that special circumstances under the Attorneys and Solicitors Act, 1843, were confined to pressure and overcharge and overcharge amounting to fraud has been abolished, and the Court may now have regard to all the facts of the case: *In re Norman.* (1) The winding up of the testator's estate was one continuous business, but the bill delivered on January 25, 1895, was only for the work done after Mr. Tanner had been taken into partnership, and was in fact merely the tail end of a bill. Moreover, the charges of the London agent are not set out in detail in that bill, and consequently the client has no opportunity of ascertaining whether those charges are correct. We rely upon these facts as constituting special circumstances under the Act, and also as shewing that on January 25, 1895, there was no delivery of any complete bill which the solicitors could sue upon.

Buckley, Q.C., and *H. Terrell*, for the respondents. The bill of January 25, 1895, is a separate and complete bill, and, more

(1) (1886) 16 Q. B. D. 673.

STIRLING J. than a year having elapsed since its delivery, it cannot be taxed except on proof of special circumstances. The items which represent the London agent's charges in a lump sum might have been included in the cash account, as it is a disbursement. The country solicitor must pay his London agent out of his own pocket in the same manner as he must pay his stationer's charges. The bill is complete notwithstanding the fact that the particulars of sundry disbursements are not set out, and that is not a special circumstance. The bill delivered by Pomeroy & Tanner as partners is wholly distinct from the bill delivered by Pomeroy for work done by him alone. The applicant must be taken to have discharged the retainer to Mr. Pomeroy when he employed the respondents, and to have given a fresh retainer to them.

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Hastings, Q.C., in reply. The work done for the client in this case was all part of the same business, and the fact that the solicitor originally employed took in a partner in the course of it is immaterial for the present purpose.

[STIRLING J. referred to *In re Hall and Barker.* (1)]

The details of the London agent's charges ought to be incorporated in the bill of the country agent. There is no privity between the London agent and the client, and therefore the client cannot demand the details from the London agent. He has no right against him except under the general jurisdiction of the Court over its officers: *Ex parte Edwards.* (2) These charges cannot be treated by the country solicitor as disbursements, inasmuch as the country solicitor is entitled to a proportion of the profit costs of the London agent.

Cur. adv. vult.

1897. Jan. 19. STIRLING J., after stating the facts substantially as above set out, continued as follows:—

This case was opened on the footing that there had been delivery of the bill more than twelve months before the application to tax, and that consequently it was necessary to make out special circumstances to justify taxation; but in the course of the argument the question was raised whether the bill

(1) (1878) 9 Ch. D. 538. (2) (1881) 7 Q. B. D. 155.

delivered on January 25, 1895, was a complete bill so as to entitle the solicitors to rely on the delivery of it for more than a year as a ground for refusing taxation. That depends on the view which is to be taken of the last item of the bill. [His Lordship read the item.]

That, of course, is a lump item, and it is a substantial item amounting to nearly one-fifth of the whole bill.

It is contended that these agent's charges are disbursements, and that it was a mistake to include them in the bill of costs at all, and that there was no necessity to deliver a detailed statement of these charges. On the other hand, it is argued that the details ought to be included as part of the bill of the country solicitor. The question is which of these contentions is right.

Let us look at it as a matter of principle. It is well settled that between the client and the London agent of the country solicitor there is no privity. The relationship of solicitor and client does not exist between the client and the London agent. What is done by the London agent is part of the work done by the country solicitor for the client. The country solicitor does or may do part of the work personally. He does or may do part of his work through clerks whom he employs in the country. Or, if necessary—and the necessity occurred in this case—he may do part of his work through a London agent. But as between the country solicitor and the client the whole of the work is done by the country solicitor. It follows, therefore, that the items which make up the London agent's bill are not mere disbursements, but are items taxable in the strictest sense as between the client and the country solicitor, just as much as items in respect of work done by the country solicitor personally, or by the clerk whom he employs in the country. That is the view which I take of the question as a matter of law. But it was suggested that the practice was the other way, and that these charges were as a matter of practice treated as disbursements in bills of costs, and I thought it right to make inquiry at the Taxing Office as to what the practice was. The taxing masters considered the question at a meeting which happened to be held at the close

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of last week and at which all the taxing masters with one exception were present, and they report to me their unanimous opinion that as a matter of practice this item of 54*l.* 8*s.* 8*d.* would be improperly charged as a disbursement, and that the details of the charge should appear in the bill, and that the proper and regular course on the part of the country solicitor where a London agent is concerned is to incorporate the charges in detail of both professional gentlemen in one bill.

It appears to me therefore, that both in strict law and having regard to the practice, this item is one which cannot be treated as an item of disbursements, but is an item as to which a detailed bill ought to be delivered. This being a substantial item, it appears to me that no complete bill was delivered until April 1, 1896. Consequently an order for taxation must go.

As regards the costs, it seems to me that the proper course is that the costs of this adjournment should be the applicant's in any event, and that the other costs should abide the result of the taxation.

Solicitors: *J. J. Harlow, for H. King, Bristol; Carthew & Wheeler.*

H. B. H.

Applied. *Re* PEROWNE (*decd.*). [1951] 2 All E.R. 201.

In re WEEKES' SETTLEMENT.

ROMER J.

1897

Jan. 15, 20.

Will—Gift to A. for Life—Power of Disposition by A. amongst a Class—Gift over in Default of Appointment—Gift by Implication—Power coupled with a Trust.

Where there is a gift to A. for life with a power to A. to appoint among a class, but no gift to the class and no gift over in default of appointment, the Court is not bound, without more, to imply a gift to the class in default of the power being exercised.

In order to imply a gift there must be a clear indication in the will that the testator intended the power to be regarded in the nature of a trust, so that the class or some of the class should take.

A testatrix bequeathed to her husband a life interest in certain real property, and gave "him power to dispose of all such property by will amongst our children." The will contained no gift over in default of appointment. There were children, but the husband died intestate without having exercised the power of disposition :—

Held, that the power conferred on the husband was a mere power and not one coupled with a trust, and that consequently there was no gift to the children by implication, and that the heir-at-law of the testatrix was entitled.

Brown v. *Higgs*, (1799) 4 Ves. 708; *Burrough* v. *Philcox*, (1840) 5 My. & Cr. 73; *Re Caplin's Will*, (1865) 2 Dr. & Sm. 527; *Re White's Trusts*, (1860) Joh. 656, discussed, examined, and distinguished.

Healy v. *Donnery*, (1853) 3 Ir. C. L. Rep. 213, discussed and followed.

SUMMONS for payment out of court of a sum of Consols standing to the credit of ex parte the London, Brighton and South Coast Railway Company, the account of the persons interested in Brookside Farm under the settlement referred to in the summons.

By a settlement dated April 27, 1857, made on the marriage of Emily Mary Weekes with James Slade, certain real property to which Emily Mary Weekes was entitled, which included the remainder in fee of Brookside Farm expectant on the death of her mother, was settled to uses in favour of the intended wife for life, and upon her death as she should, whether covert or sole, by will appoint, and in default of appointment to the use of the person or persons who at the decease of E. M. Weekes would have been entitled thereto by descent in case she had died seised thereof by purchase intestate and a widow.

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By a settlement of even date certain personal property therein described was settled in favour of James Slade and his wife during their lives and the life of the survivor, and after the decease of the survivor in trust for the issue of the marriage as the husband and wife should by deed jointly appoint, and in default as the survivor should by deed or will appoint, and in default of appointment for all the children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares.

Pursuant to the powers given to them by their Acts the London, Brighton and South Coast Railway Company took certain parts of the Brookside Farm and paid the purchase-money into Court, and the Consols in court represented such purchase-money.

Emily Mary Slade died in May, 1885, having made her will, dated April 15, 1885, which so far as is material was in the following words: "I bequeath to my husband James Slade a life interest in all property real or personal which may come to me in accordance with the will of my late father Richard Weekes and also in the house which I took under the will of my late cousin George Weekes and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements. I also bequeath unto him the said James Slade all my effects clothes jewellery and other articles to be at his entire will and disposal." The will contained no gift over in default of appointment.

James Slade died in February, 1893, intestate and without having exercised the power of disposition given him by the will of his wife, Emily Mary Slade.

There were fourteen children of the marriage, eight of whom survived their mother and were living.

The tenant for life having recently died, this was an application for payment out of the Consols in court in eighths on the ground that the will of Emily Mary Slade gave to James Slade a life interest in the Brookside Farm with a power to appoint among the children of the marriage, and that this power not

having been exercised the children were entitled equally. The respondent, the eldest son, claimed the Consols as heir-at-law of Emily Mary Weekes.

R. M. Pattisson, for the applicants. There being no gift over in the will, the children living at the death of Mrs. Slade take the Consols equally, there being a gift to them by implication in default of appointment.

Where there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the Court implies a trust for or a gift to those objects equally, if the power is not exercised: Farwell on Powers, 2nd ed. p. 466; *Brown* v. *Higgs* (1); *Burrough* v. *Philcox* (2); *Witts* v. *Boddington* (3); *Forbes* v. *Ball* (4); *Birch* v. *Wade* (5); *Re Caplin's Will* (6); *Re White's Trusts* (7); *Butler* v. *Gray* (8); *In re Brierley*. (9) *Carberry* v. *M'Carthy* (10) and *Healy* v. *Donnery* (11) are decisions the other way. In *Healy* v. *Donnery* (11) a testator devised a freehold interest to his daughter for life with power by deed or will to dispose of the freehold estate among her children in such shares and proportions as she should think fit, with a residuary gift to the daughter, and the Court held that the daughter took an absolute estate in the freehold, and not a mere life estate, with a power of appointment among children and a gift by implication to the children. I submit that on the true construction of this will the children are entitled equally to the fund.

Micklem, for the heir-at-law of Mrs. Slade, was not called on.

J. T. Prior, for the railway company.

ROMER J. By the settlement of April 27, 1857, the property now represented by the Consols in court was settled on Emily Mary Slade for life with remainder as she should by will appoint, and with a gift over in default of appointment.

By her will, dated April 15, 1885, Mrs. Slade bequeathed the

(1) 4 Ves. 708; (1800) 5 Ves. 495; (1803) 8 Ves. 561.
(2) 5 My. & Cr. 73.
(3) (1789) 3 Bro. C. C. 95.
(4) (1817) 3 Mer. 437.
(5) (1814) 3 V. & B. 198.
(6) 2 Dr. & Sm. 527.
(7) Joh. 656.
(8) (1869) L. R. 5 Ch. 26.
(9) (1894) 43 W. R. 36.
(10) (1881) 7 L. R. Ir. 328.
(11) 3 Ir. C. L. Rep. 213.

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property in the following terms: [His Lordship read the will as above set out.]

The husband did not exercise the power of appointment, and the question is whether the children take in default of appointment.

Now, apart from the authorities, I should gather from the terms of the will that it was a mere power that was conferred on the husband, and not one coupled with a trust that he was bound to exercise. I see no words in the will to justify me in holding that the testatrix intended that the children should take if her husband did not execute the power.

This is not a case of a gift to the children with power to the husband to select, or to such of the children as the husband should select by exercising the power.

If in this case the testatrix really intended to give a life interest to her husband and a mere power to appoint if he chose, and intended if he did not think fit to appoint that the property should go as in default of appointment according to the settlement, why should she be bound to say more than she has said in this will?

I come to the conclusion on the words of this will that the testatrix only intended to give a life interest and a power to her husband—certainly she has not said more than that.

Am I then bound by the authorities to hold otherwise? I think I am not. The authorities do not shew, in my opinion, that there is a hard and fast rule that a gift to A for life with a power to A to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases shew (though there may be found here and there certain remarks of a few learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A. for life with a gift over to such of a class as A shall appoint.

I will now examine the authorities which have been cited, and shew that this is so, though I may remark that the case before me is peculiar in this, that there is a gift over in default of appointment by the husband by force of the settlement, so that this will need not in any case come within the general proposition above stated.

Now, do the authorities bear out what I have stated? One of them, an Irish case, *Healy* v. *Donnery* (1), clearly tells against the proposition contended for. In that case there was a gift of a freehold interest to a daughter for life, with power by deed or will to dispose of the same to and among her children, with no gift over in default of appointment. There was indeed a residuary gift, but that, as pointed out by the Court of Appeal in *In re Brierley* (2), is not equivalent to a gift over in default of appointment for the purposes of the above proposition. The case, therefore, was merely a devise for life with power by deed or will to appoint the remainder to and among the children, and that was held not to give an estate by implication to the children. The proposition now contended for was then urged also by the party who failed, and was thus dealt with by Pennefather B. in his judgment (3): "It is argued that the power to appoint among the children is tantamount to a trust created for them. I have always considered that there was a distinction between a mere power and one coupled with a trust; and though I called on counsel for an authority to the contrary, no such case has been cited. But particular cases have been cited, in which Courts have thought that they collected from the peculiar words of the power an intention of the testator to give to children in default of appointment. The general position" (quære proposition) "contended for by the defendant's counsel has never been laid down; and I cannot say that this case falls within the authority of any of the cases cited."

But other cases have been cited to me, so I will refer to them also, and shew that this statement of the law by Pennefather B. is correct.

In *Brown* v. *Higgs* (4) the gift was as follows: [His Lordship

(1) 3 Ir. C. L. Rep. 213.
(2) 43 W. R. 36.
(3) 3 Ir. C. L. Rep. 216.
(4) 4 Ves. 708.

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stated the gift.] In other words, it was a gift of the kind I have before indicated—a gift to such of the children as a certain person should appoint, that is to say, there was a mere power of selection given. The will on its wording sufficiently set forth the intention that the class or some of the class should take. That this was really the ground of the decision of the Master of the Rolls (Lord Alvanley) is apparent from his judgment, for he says (1): "Upon the true construction of this will I am of opinion, it is equivalent to saying, he gives it to the children of Samuel Brown or of William Augustus Brown, with a power to John Brown to select any he thinks fit and to exclude the others; and it is too much to contend that nothing is intended for them exclusive of the appointment of John Brown. The fair construction is, that at all events the testator meant it to go to the children; and these words of appointment he used only to give a power to John Brown to select some and exclude the others." That is to say, where you can find that the power is only a power to select, the gift being to a class, of course, if the power is not executed the class take. That case came before the Court again. (2) The particular point that I am considering is dealt with (3), and Lord Alvanley, again considering the case, says this, after referring to the words of the will: "Upon this disposition and the facts, that have taken place, the question is, whether this sentence in the will, upon which the question arises, is to be considered as merely giving John Brown a power if he thinks fit, to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether upon the true construction it is anything more or less than a mere trust in him, with a power to single out any he might think more deserving, but a gift to him in trust for these children at all events; and I am of the same opinion, upon very full consideration, and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown; and that his non-exercise of that power, or the circumstance of his being incapable of exercising it, will not prevent the objects of the testator's bounty from

(1) 4 Ves. 719. (2) 5 Ves. 495. (3) 5 Ves. 500.

taking in some manner; though the power of distribution on account of the death of the trustee cannot now be exercised."

The case finally came on appeal before Lord Eldon (1), and he dealt with the precise point (2) as follows: "It is perfectly clear, that, where there is a mere power of disposing, and that power is not executed, this Court cannot execute it. It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. One question therefore is, whether John Brown had a trust to execute, or a power, and a mere power." And under the wording of that will he held that it was a trust. That case, therefore, obviously is no authority for the general proposition contended for before me.

Next comes the case of *Burrough* v. *Philcox*. (3) In that case the will was very peculiar. The testator directed that certain stock and real estate should remain unalienated until certain contingencies were completed, and, after giving life interests in such stock and estates to his two children with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of as after mentioned, that was to say, the survivor of his two children should have power to dispose by will of his real and personal estate "amongst my nephews and nieces, or their children, either all to one of them or to as many of them" as his surviving child should think proper. This was held to create a trust in favour of the class subject to a power of selection and distribution in the surviving child. And why? Because by the terms of his will the testator intended and purported to dispose of the property absolutely, seeing that on the contingencies being completed he declared that the property should be "disposed of as after mentioned." The ground of the decision is stated in the judgment (4) thus: "These and other cases shew that when there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection

(1) 8 Ves. 561.
(2) Ibid. 570.
(3) 5 My. & Cr. 73.
(4) Ibid. 92.

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not being made, the Court will carry into effect the general intention in favour of the class." This case, therefore, is equally no authority in favour of the proposition.

With regard to the case of *Witts* v. *Boddington* (1), that, again, was on a peculiar will, the decision being that the power as between the testator and the donee of the power was in the nature of a trust.

Forbes v. *Ball* (2) is very shortly reported. It was held that the power had been exercised, and there is only a short statement that (3) "the Court was of opinion that the words in the testator's will raised a trust for the wife's relations, subject to her appointment." That is all that is stated on that point; but if that was decided, then it is clear at least to my mind that it is a decision upon the particular wording of the will, which was as follows: "I give to A. C. 500*l.*, and it is my will and desire that A. C. may dispose of the same amongst her relations, as she by will may think proper." The Court must have held, I have no doubt, that by force of the words "my will and desire" there was a sufficient indication of the intention of the testator that A. C. should dispose of it. The words "my will and desire" might be said (especially as the authorities on precatory trusts then stood) to be incompatible with the idea that a mere power was given to A. C. which she might or might not exercise at her option. That case is no authority for the general proposition.

It is clear, in my opinion, from the judgment in *Birch* v. *Wade* (4), that the true ground of the decision there was that the power was in the nature of a trust by force of the words that had been used by the testator of his "will and desire."

In *Re Caplin's Will* (5) the testator, after giving a fund to his wife for life, directed that after her death it should be paid to such and so many of the relatives or friends of the wife as she should by will appoint—in other words, it was a case of the kind I have before referred to, a gift to a class or such of a class as should be selected by the donee of the power. In that case

(1) 3 Bro. C. C. 95.
(2) 3 Mer. 437.
(3) 3 Mer. 440.
(4) 3 V. & B. 198.
(5) 2 Dr. & Sm. 527.

there was a general statement (1) which went beyond the case; but that statement of the judge should, I think, be considered with reference to the case that the Vice-Chancellor had before him.

Re White's Trusts (2) was like *Re Caplin's Will.* (3) It was a trust "for A. for life, and if he should die childless, upon trust to apply the sum to the benefit of such of testator's children, or their issue, as the trustees should think fit, for the interest and good of testator's family." There, again, there was a general statement made by the learned judge, and in my opinion, unless checked by reference to the case before him, that statement was too large. The Vice-Chancellor said: "It is settled by *Brown* v. *Higgs* (4) and *Burrough* v. *Philcox* (5), that, where there is a power to appoint among certain objects, and no gift in default of appointment, the Court will imply a gift to the objects of the power equally." I have pointed out that those two cases did not decide that. I have no doubt Wood V.-C. in making that statement, meant it to be considered with reference to cases where the facts were similar or somewhat similar to those in *Brown* v. *Higgs* (4) and *Burrough* v. *Philcox* (5)—that is to say, cases where you can gather from the will that the class are intended to take, and a selection only is given to the person having the power of appointment, as was shewn by the observation in *Burrough* v. *Philcox* (6), to which I have already referred."

Butler v. *Gray* (7) was a case where there was a sufficient indication that the class was to take; and lastly, *In re Brierley* (8) was a decision not in point on the proposition contended for.

I have now shewn that none of the cases relied on by the applicants establish the general proposition; and I hold that in this case there was no gift by implication to the children of Emily Mary Slade in default of appointment by her husband.

Solicitors: *Nicol, Son, & Jones; Sharpe, Parker & Co., for D. T. Jeffreys, Brecon; Rose & Co.*

(1) 2 Dr. & Sm. 531.
(2) Joh. 656, 659.
(3) 2 Dr. & Sm. 527.
(4) 4 Ves. 708.
(5) 5 My. & Cr. 73.
(6) Ibid. 92.
(7) L. R. 5 Ch. 26.
(8) 43 W. R. 36.

G. M.

C. A.
1897
Jan. 22, 30.

In re NATIONAL BANK OF WALES.

TAYLOR, PHILLIPS, AND RICKARDS' CASES.

[00149 of 1896.]

Company—Winding-up—Contributory—Transfer of Shares during voluntary Liquidation—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 131, 133, 153.

The power of a voluntary liquidator under s. 131 of the Companies Act, 1862, to sanction a transfer of shares made after the commencement of the winding-up, involves the power to alter the register of members; and the transferor is thereupon released from the liability which he was under at the commencement of the winding-up to contribute as a present member, and the transferee alone is the person to be placed on the A list of contributories.

Where successive transfers are sanctioned by the liquidator under s. 131, the ultimate transferee only is liable to contribute as a present member, the transferor and prior transferees being liable as past members.

THIS was an appeal from a decision of Vaughan Williams J. (1)

By a confirmatory resolution dated January 12, 1893, it was resolved that the National Bank of Wales, Limited, should be wound up voluntarily. The resolution was passed with the view of carrying out an amalgamation between the National Bank and the Metropolitan, Birmingham and South Wales Bank, Limited, and a liquidator for that purpose was appointed. At this date, June 12, 1893, Mr. William Taylor was the holder of thirty 20*l.* shares in the National Bank of Wales, upon which 10*l.* only had been paid. Some months after this resolution to wind up, namely, upon November 29, 1893, Mr. Taylor, with the sanction of the liquidator, transferred his thirty shares to Mr. Phillips. This transfer was registered in the register of transfers of the bank, the certificate of these shares which had been issued to Mr. Taylor was cancelled, and a fresh certificate thereof was issued to Mr. Phillips, whose name was thereupon placed upon the register of shareholders in the place of Mr. Taylor in respect of these thirty shares. All this was done with the sanction of the liquidator.

(1) [1896] 2 Ch. 851.

Some six months later, namely, upon May 24, 1894, Mr. Phillips, also with the sanction of the liquidator, transferred the thirty shares to Mr. Rickards; and like proceedings were thereupon had as when Mr. Phillips became transferee of the shares from Mr. Taylor, and Mr. Rickards' name was then placed upon the register of shareholders in place of the name of Mr. Phillips in respect of these shares, and remained there at the date of these proceedings. All this was also done with the sanction of the liquidator.

Vaughan Williams J. found that the liquidator, when he sanctioned these respective transfers, acted in good faith and for what he honestly considered to be the interests of the bank in liquidation, and in accordance with his duty as liquidator.

When these transfers were taken it was not supposed that the shareholders of the National Bank of Wales would be called upon to contribute to its debts. This however, in the result, turned out not to be so; and thus the question arose whether Mr. Taylor, or Mr. Phillips, or Mr. Rickards, or all three or which of them, were to be placed upon the list of contributories, and upon which list, whether upon the A or the B list. The liquidator placed all three gentlemen upon the A list. Vaughan Williams J. held that Mr. Taylor alone ought to be placed on this list; that Mr. Phillips and Mr. Rickards ought to be taken off the list; that Mr. Taylor was entitled to be indemnified by Mr. Phillips; and that Mr. Phillips was entitled to be indemnified by Mr. Rickards; and he left Mr. Rickards' name upon the register of shareholders.

Mr. Taylor appealed; and upon the appeal it was agreed that all questions between the parties should be open.

Levett, Q.C., and *E. C. Macnaghten*, for Taylor. Vaughan Williams J. held that the voluntary liquidator under s. 131 of the Companies Act, 1862 (1), had power to alter the register of

(1) Sect. 131: "Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding-up shall be void. . . ."

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members by substituting the name of the transferee for the transferor, but had no power to alter the status of the transferor so as to relieve him of his liability as contributory under s. 38 (1); and further, that though the Court had power to alter the status of the transferor, in the circumstances of this case, it ought not to put any one else on the list of contributories. Under s. 38 the primary liability to contribute is on present members; and, having regard to the definition of membership in s. 23, it is submitted that Rickards is the person liable to contribute as a present member, Taylor and Phillips being liable to contribute only as past members if called upon—in other words, that Rickards ought to be placed upon the A list of contributories, Taylor and Phillips on the B list. No doubt the words in sect. 131 forbidding the liquidator to alter the status of members present a difficulty: *Rudge* v. *Bowman* (2); but to say that a transfer is to be effective and that the register may be altered in conformity therewith, and yet that the transferor is to remain a member, is a contradiction in terms. In *Cleve* v. *Financial Corporation* (3) Bacon V.-C. evidently thought that the effect of the liquidator's sanction to a transfer under s. 131 was to substitute the liability of the transferee for that of the transferor, and that if the liquidator desired to keep the liability of the transferor he could only do so by an express bargain to that effect. It was contended in the Court below that any person whose name was on the register at the date of the commencement of the winding-up was a present member,

(1) Sect. 38: "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say):

"(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up."

"(3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

(2) (1868) L. R. 3 Q. B. 689, 696.

(3) (1873) L. R. 16 Eq. 363, 381.

and must ever afterwards remain liable to contribute as a present member; but the Act contains no such provision, and, except in the case of joint membership, there cannot be two persons liable at the same time as present members in respect of the same share. *Webb* v. *Whiffin* (1) and *Burgess's Case* (2) were relied on as shewing that the words "past and present members" in s. 38 were referable to the commencement of the winding-up; but in those cases the Court was not dealing with the effect of a permitted transfer made after the commencement of the winding-up. In the case of a compulsory winding-up the sanction of the Court under s. 153 is essential to the validity of all transfers made after the commencement of the winding-up; and, even if the list of contributories has been settled, the Court has power under s. 98 to take off the name of the transferor and put on the name of the transferee: *In re Onward Building Society* (3); and under s. 133, clause 8, the voluntary liquidator has the same power.

Where a person contracts to become a member before the commencement of the winding-up, but is not registered until afterwards, s. 38 throws the liability to contribute as a present member on the transferee: *Fyfe's Case.* (4)

The only reasonable interpretation of s. 131 is that a transfer with the sanction of the liquidator has the full effect of an ordinary transfer, and that the liquidator can sanction an alteration of status so far as is necessary to give full effect to the transfer.

Buckley, Q.C., and *Ingpen*, for the liquidator. We submit, first, that all three names ought to be on the A list of contributories; secondly, that, at all events, Taylor's name ought to be on. "Alteration of status," as used in ss. 131 and 153, means alteration in respect of liability as between the members and the company—that is to say, alteration in respect of calls to be made in the winding-up: *Barge's Case* (5); *Castello's Case.* (6) That alteration cannot be affected by anything which the voluntary liquidator may do under s. 131.

(1) (1872) L. R. 5 H. L. 711, 725.
(2) (1880) 15 Ch. D. 507, 512.
(3) [1891] 2 Q. B. 463.
(4) (1869) L. R. 4 Ch. 768.
(5) (1868) L. R. 5 Eq. 420.
(6) (1869) L. R. 8 Eq. 504.

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Under s. 38 the liability to be placed on the A list of contributories is on the person whose name is on the register of members at the commencement of the winding-up; and after that date his status as member cannot be altered, as such alteration might prejudice the position of outside creditors: *Vining's Case.* (1)

[LINDLEY L.J. That case was decided under s. 161.]

The effect of a transfer sanctioned by the liquidator under s. 131 is that it passes all the beneficial interest in the shares, but does not relieve the transferor from liability.

Sect. 153 differs in its terms from s. 131, and it may be that under s. 153 the Court would have power to release the liability of the transferor in the case of a compulsory winding-up, and that by virtue of s. 138 that jurisdiction might be exercised in the case of a voluntary winding-up; but the liquidator has no such power. Taylor, therefore, is liable to be placed on the A list. As regards Rickards, we do not rely either upon s. 131 or on s. 38 to fix him with liability; but we say that his liability arises from his contract of membership; that, having accepted the benefits of membership, he must undertake the burdens, and that he is, therefore, liable to pay calls under ss. 16 and 70. As regards Phillips, he was liable on the same principle until Rickards was put on the register; and we submit that his liability is continued by virtue of s. 75, which provides that the liability to future calls is a present liability. Therefore, Taylor, Rickards, and Phillips are all liable. It is not, however, contended that the liquidator can obtain any greater relief than if only one person was liable; and their liability is to be settled according to the principles laid down in *Kellock* v. *Enthoven* (2), where it was held that several past members might be liable simultaneously.

Bramwell Davis, Q.C., and *Muir Mackenzie*, for Phillips. Inasmuch as Phillips is bound to indemnify Taylor, it is his interest to contend that Rickards alone is liable. A transfer made after the winding-up, although not sanctioned by the liquidator, is good as between the parties themselves, and the object of s. 131 is to determine the effect of the transfer as

(1) (1870) L. R. 6 Ch. 96. (2) (1874) L. R. 9 Q. B. 241.

regards the company: *Biederman* v. *Stone*. (1) While the company is a going concern the owner of a share may transfer it at will, subject to his finding a legally competent transferee, and thereupon his liability ceases. Consequently, a transfer necessarily involves a complete alteration of the status of the transferor, for he ceases to be a shareholder. The two portions of s. 131 are, therefore, inconsistent. But it is less difficult to construe the later words as equivalent to "alteration of status except so far as is involved by a permitted transfer," than to say that the Legislature intended to create by implication a new kind of transfer.

If a permitted transfer under this section is to have the ordinary effect of a transfer, neither Phillips nor Taylor is liable as a present member.

Further, we contend that Phillips is not liable as a past member, because by s. 38 no one can be a past member unless he was a past member at the date of the liquidation: *Webb* v. *Whiffin*. (2)

Farwell, Q.C., and *Ingle Joyce*, for Rickards. Taylor is the only person who ever was a member of the company, and there can be no liability to contribute apart from present or past membership (see ss. 23, 25, 26, 38). A man does not become a member by a mere transfer unless his name is put on the register; and it is submitted that the liquidator had no power to rectify the register by putting on the name of the transferee. That is for the Court alone (cf. s. 98 and s. 133, clause 8). A transfer after the commencement of a voluntary winding-up will not be assumed except where a surplus is probable; and the object of s. 131 was merely to relieve the liquidator from the necessity of inquiring into any dealings with the shares after the commencement of the winding-up unless he himself consented to the transfer. Under that section the liquidator may sanction the transfer so far as regards the distribution of assets, but not so as to alter the status, i.e., not as regards liability. If he does not consent to the transfer, he merely pays the person who is on the register.

(1) (1867) L. R. 2 C. P. 504. (2) L. R. 5 H. L. 711, 725.

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Sheldon, for the Metropolitan, Birmingham and South Wales Bank.

Levett, Q.C., in reply.

Cur. adv. vult.

Jan. 30. LINDLEY L.J. The question raised on this appeal is, Who ought to be put on the list of contributories of a company being wound up voluntarily when after the commencement of the winding-up shares have been transferred with the consent of the liquidator? Is the person to be on the A list the transferor or the transferee; or, are both to be on that list; or, is the transferee to be on the A list and is the transferor to be on the B list? This is the general question, and it turns on the true construction of s. 131 of the Companies Act, 1862—a section which applies to all companies which are being wound up voluntarily, whether they are registered with limited or unlimited liability, and whether the shares are fully paid up or not.

The National Bank of Wales was formed and registered under the Companies Act, 1862, with limited liability. Its shares were not paid up in full. Resolutions were passed to wind it up voluntarily with a view to transferring its business to another limited company. At the commencement of the winding-up Mr. Taylor was the registered holder of thirty shares. On November 29, 1893, he transferred them to Phillips with the assent of the liquidator. This transfer was duly registered by the liquidator. Taylor's name was removed from the register, and Phillips' name was put on it. Taylor's certificate was cancelled, and a new certificate was issued to Phillips. All this was done by the liquidator. On May 24, 1894, Phillips transferred these shares to Rickards with the assent of the liquidator, and the same formalities were gone through by the liquidator as on the former occasion. These transfers were sanctioned as part of a scheme of arrangement approved by the liquidator, and the propriety of which is not in question.

If, therefore, the liquidator had power to assent to these transfers, and to give effect to them in the usual way by registering the transferee as a member in the place of his transferor, it will follow that both Taylor and Phillips have ceased to be

members, and Rickards has become a member in his place. The consequence of this, on the same supposition, would be that Rickards would be liable to be placed on the list of contributories as the member liable to future calls if any should be made in the winding-up, and that Phillips and Taylor would only be liable to be put on the list as persons who had been, but who had ceased to be, members. If, on the other hand, the liquidator had no power to assent to the transfer and to give effect to it by substituting the transferee for the transferor as a member, it would follow that Taylor ought to be still on the register, and to be on the list of contributories accordingly as a continuing or present member.

Vaughan Williams J. has come to the conclusion that the liquidator had power to assent to the transfers and to alter the register of members, but that he had no power to release Taylor from the liability which he was under at the commencement of the winding-up. The learned judge, therefore, has left the register as the liquidator altered it—i.e., has left Rickards on it as the existing member, but has put Taylor alone on the list of contributories. I confess I cannot think that this is right.

The commencement of the winding-up of a company is a very important date, whether the company is being wound up by the Court or voluntarily, or subject to supervision. Subject to what the statute allows to be done after that time, nothing can be done after that date to prejudice the creditors or to alter the rights or liabilities of the then members. Moreover, persons who have ceased to be shareholders for one year or more before that date are under no liability to contribute to the debts or liabilities of the company (see s. 38, clause 1). But certain things are allowed to be done after that date, and amongst other things allowed are transfers of shares in companies being wound up voluntarily, if such transfers are made to or with the sanction of the liquidators of such companies (see s. 131). But what is meant by a transfer of a share? The word "share" does not denote rights only—it denotes obligations also; and when a member transfers his share he transfers all his rights and obligations as a shareholder as from the date of the

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transfer. He does not transfer rights to dividends or bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls. Again, the power given to liquidators by s. 131 to sanction a transfer of shares is not a power to sanction a transfer of benefits only, but to sanction a transfer of all those rights and obligations which together constitute what is called a share. This appears to me to be so plain that I cannot suppose any one could doubt it if it were not for the words in s. 131, "or alteration in the status of the members of the company." I cannot construe these words as nullifying the power of the liquidator to take or sanction a transfer of shares and to register such transfer in the ordinary way. Some alteration in the status of a member other than that occasioned by a transfer sanctioned by the liquidator must here be referred to. The words in question are far from meaningless. They apply to transfers made before the commencement of the winding-up and without the sanction of the liquidators, but not then registered. The words also apply to and prevent alterations in liability and status by agreements not involving transfers—e.g., such an arrangement as was made in *Barge's Case*. (1) Also alterations in the status or liability of members under a company's articles of association providing for forfeiture or cessation of membership, and liability in the event of winding-up. Other cases, which do not at present occur to me, might possibly arise in practice. The words are evidently put in to hit transactions not authorized by the words which precede them.

It is said that s. 38 presents a difficulty in putting on the list of contributories, either as a present or a past member, any person who was not either a present or a past member at the commencement of the winding-up. It is said that neither Phillips nor Rickards can be put on the list, they not being at that time either present or past members; and that Taylor, who was then a present member, must be put on the list as such. I admit that this view would be correct if there were no provisions in the Act permitting transfers after the commence-

(1) L. R. 5 Eq. 420.

ment of the winding-up. I have no doubt that the expression "all present and past members" has reference to the commencement of the winding-up. But the expression is not confined to them. There is no definition or language in s. 38 so rigid as to prevent transfers authorized by s. 131 or s. 153 from operating so as to render the transferees liable as present members and the transferors liable as past members. The Court has frequently put on the list of contributories as present members persons who have agreed to buy shares before the commencement of the winding-up, but who, not having been registered at that time, were not then present members of the company. *Fyfe's Case* (1) is one of many instances in which this has been done. In all these cases the transferors who were present members at the commencement of the winding-up have been struck off the list of contributories as present members, but no one ever doubted their liability to be put on it as past members. These cases shew that s. 38 presents no difficulty in giving effect to whatever transfers or alterations of status are permitted by other sections of the Companies Act, 1862. No doubt clause 1 of s. 38 can have no application to members who transfer their shares after the commencement of the winding-up with the consent of the liquidator or the Court, as the case may be. Such transferors do not escape liability altogether; but there is nothing to prevent them from being treated like all other transferors who are not discharged from liability altogether—nothing to prevent them from being put on what is called the B list. So, as regards the transferee, although he is not a present member at the commencement of the winding-up, there is nothing in s. 38, when taken in conjunction with ss. 131 and 153, which prevents him from incurring the liabilities of present members and from being put on the A list of contributories. Then it is said that s. 133, clause 8, and ss. 98 and 35, relating to the settlement of the list of contributories and rectification of the register, prevent the liquidator from rectifying the register and from giving full effect to any transfer which he may have sanctioned. But altering the register so as to make it conformable with a lawful

(1) L. R. 4 Ch. 768.

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transfer is not the same thing as rectifying the register under s. 35. That section only comes into operation when the company improperly puts on the register a name which ought not to be on it, or improperly refuses to put on the register a name which ought to be on it. To alter the register from time to time so as to make it conformable with transfers sanctioned by the liquidator is, in my opinion, clearly within the powers conferred on him by s. 131 and s. 133, clause 7, which brings in s. 95, clauses 4 and 8. His power to vary the list of contributories and make it conformable with permitted transfers is conferred by s. 133, clause 8, and s. 98 and rule 29, and indeed follows as a matter of course. Vaughan Williams J. took the same view that I take as to the inapplicability of s. 35 to cases of this kind; but, taking a different view of s. 131, and of its effect on s. 38, he held that the liquidator could not give effect to transfers sanctioned by him by altering the register or the list of contributories. As already stated, the learned judge has put Rickards on the register of members and has removed Taylor from it, and yet he has put Taylor on the list of contributories and omitted Rickards from that list. This is quite a new departure from established practice and is, in my opinion, erroneous in principle. It is true that the register of members is one thing and the list of contributories another. The list of contributories ought to comprise, not only all persons properly on the register, but also all those who, although not on it, ought to be on it. But it is quite a novelty to find persons properly on the register and not on the list of contributories except in the cases of death, bankruptcy, and married women, which are specially provided for by ss. 76 to 78. The learned judge's view is based on the ground that s. 131 only enables the liquidator to sanction transfers of the benefits enjoyed by members, and not of the burdens to which they are subject. I have already given my reasons for dissenting from this view of the section.

It was contended in argument that s. 131 only contemplated the sanction of the liquidator in order to relieve him from difficulty in ascertaining who was to receive the surplus assets if any should be distributable. But notice to him would suffice for this purpose. Sanction by him means approval, and implies

a power of disapproval; and if all that was meant was that he should be informed of transfers of rights to surplus assets, very different language would have been used. Counsel for the liquidator contended that Taylor and Phillips and Rickards should all be settled on the A list; but this is, in my opinion, plainly wrong. Two or more members can only be liable to be on the A list as contributories in respect of the same shares if they are joint holders of those shares. Successive former holders of the same shares may be put on the B list, and indeed must be put on it unless they are protected by clause 1 of s. 38; but there is nothing to warrant a similar proceeding in the case of persons liable to be on the A list as present members. It is to be observed that s. 131 empowers the liquidator to sanction all transfers after the commencement of the winding-up, and s. 153 in terms only empowers the Court to sanction such transfers between the commencement of the winding-up and the winding-up order; but there can be no doubt that the Court can sanction transfers after a winding-up order: see *In re Onward Building Society*. (1) Nothing turns upon this difference in language in the present case; but s. 131, coupled with s. 133, clause 8, and rule 29, shew that the liquidator had power to alter the register as he did and to settle the list of contributories in conformity with it.

The conclusions at which I have arrived are: (1.) that the register of members has been from time to time correctly altered by the liquidator, and that Rickards is the person to be on that document; (2.) that Rickards is the person, and the only person, to be on the A list of contributories in respect of the shares in question; (3.) that Taylor and Phillips ought both to be on the B list, so that in case of need they may be had recourse to for the payment of the debts and liabilities of the company and the costs of winding-up, in accordance with s. 38 of the Companies Act, 1862. This would obviously be right if the company were being wound up by the Court or subject to its supervision, and if the Court had sanctioned the transfer under s. 153; and I can find no sufficient reason for holding that the position of the parties to duly authorized transfers of

(1) [1891] 2 Q. B. 463.

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shares in a company after the commencement of its winding-up depends upon whether the company is being wound up in one way rather than another. Mr. Taylor's appeal must therefore be allowed, and, the case being a test case, the costs may be paid by the liquidator out of the assets of the company.

A. L. SMITH L.J., having stated the facts as set out in the statement, continued as follows:—

To determine this, which is said to be a test case, s. 38 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which deals with what is the liability of members when the company ceases to be a going concern and is being wound up, must be fully considered. [The Lord Justice referred to the section, and continued:—]

Now in my judgment the crucial date in this section is the commencement to wind up, and, assuming no alteration in the register of shareholders to have lawfully taken place after that date, it is the governing date in the section. Then is to be ascertained who are "present members," and also who are "past members," and who of these latter are outside the meshes of the section, namely, those who had ceased to be members for a period of one year or upwards, prior to the commencement of the winding-up.

The view taken by the Lords Justices in *Vining's Case* (1) shews that this is so. James L.J., who was then dealing with the effect of s. 161 upon s. 38, said: "Does a shareholder, by giving the notice that he is a dissentient shareholder . . . . cease to be a shareholder, so as not to be a member of the company at the time of the winding-up? . . . . There is nothing in that section (161) that appears to me to qualify the plain words of the previous section (38), which says that every person who shall be a shareholder at the commencement of the winding-up shall be liable to contribute to the debts." And Mellish L.J. also was of the same opinion, for he said: "Mr. Vining having been a shareholder at the time the resolution to wind up was passed, is clearly primâ facie liable to be a contributory; and the question is, whether he is dis-

(1) L. R. 6 Ch. 96, 100.

charged from that liability by having made a transfer according to the true meaning of the 161st section."

The real point in this case is the effect of s. 131 upon s. 38. Does this section (131) in the circumstances of the transfers and of the sanctions given by the liquidator thereto discharge Mr. Taylor from being a present member at the date of the commencement to wind up and convert him into a past member? The same point arises upon the sanctioned transfer from Mr. Phillips to Mr. Rickards. In other words, does s. 131 empower a liquidator in a voluntary winding-up to sanction a transfer of shares by a present member to a transferee, so that the transferee becomes a present member and the transferor a past member? I do not refer to s. 153, for I do not think that that section throws any real light upon s. 131. [The Lord Justice read s. 131, and continued:—]

The exception in the section in favour of transfers made with the sanction of the liquidator refers solely to the case of transfers of shares. The exception in no way applies to the alteration of status. It is clear that this section does not make a transfer of shares from a transferor to a transferee, if made with the sanction of the liquidator, void; but, on the contrary, it expressly contemplates and permits a transfer with that sanction. It will be seen that the two limbs of the section, if read literally, conflict. Which is to give way? That relating to transfer, or that relating to status? This is the difficulty.

That the term "transfer of shares" primâ facie means a transfer of shares with all its attendant liabilities and advantages, I do not doubt; and unless the context of the section be such as to require a more limited construction, the natural meaning should be adopted.

It is said, and said truly, that the status of Mr. Taylor at the commencement of the winding-up was that of a "present member," and therefore that of a contributory in the winding-up, and liable to be placed upon the A list, and that if the primâ facie meaning be given to the words "transfer of shares," the status of Mr. Taylor is altered as between him and the creditors of the company, for at the commencement to wind up he was liable to be a contributory upon the A list, whereas upon

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this construction of the section he is not so, and is only liable to be placed upon the B list.

Mellish L.J. in *Vining's Case* (1) felt the difficulty, for he says: "No doubt the 131st section does seem to contemplate that, in some cases of voluntary winding-up, there may be a transfer of shares. It is not at all easy to say what cases those are"; and, on the other limb of the section, Blackburn J. in *Rudge* v. *Bowman* (2) also felt the difficulty as to what construction was to be placed upon the words "alteration of status of member."

I have had, I admit, considerable doubts upon the true construction of s. 131; but I have come to the conclusion that, to give effect to each of the provisions of this section, the latter phrase as to status must be limited to alteration in the status of members other than that which is necessarily consequent upon the sanctioned transfer of shares to be found in the prior part of the section. This reading of s. 131 brings the man who is lawfully upon the register of shareholders upon the list of contributories; and Mr. Rickards, therefore, is rightly upon the register of members as a present member; and consequently Mr. Taylor becomes a past member, i.e., Mr. Rickards comes upon the A list, and Mr. Taylor upon the B list of contributories. The same reasoning applies to Mr. Phillips, and he comes upon the B. list. I agree with my brother Williams that the liquidator had power to make this alteration in the register of members.

The result, therefore, is that I think my brother Williams's judgment should have been as above—that is, that Mr. Rickards must be placed upon the A list, and Mr. Taylor and Mr. Phillips upon the B list—and the appeal succeeds.

I agree with Lindley L.J. as to costs.

RIGBY L.J. I have come to the same conclusion. In my judgment the whole question turns upon the construction of s. 131. That is a section which deals, in reference to a voluntary winding-up, with a similar subject-matter to that which is dealt with in s. 153, with regard to the case of

(1) L. R. 6 Ch. 96, 103. (2) L. R. 3 Q. B. 689, 696.

a compulsory winding-up. I think s. 131 contains internal evidence that it has been modified either from s. 153, or from some form which has been more or less common to both. It also contains plain proof that such modification has been clumsily executed; so that there is at any rate an appearance of contradiction between one part of the section and another.

It is not easy to see how there can be a legitimate—an authorized—transfer of a share without some alteration of status. But I think when we look at the case of a voluntary winding-up and consider what it may involve, a great deal of the difficulty disappears. The voluntary winding-up of a company involves no sort of assumption that the company is other than a prosperous one. It may be the excess of its prosperity which leads to its winding-up, because such excellent terms have been offered to it from some other company. It frequently is so.

Now, a company may be carrying on a business of the utmost importance, and although it can only be continued so far as may be required for the beneficial winding up thereof, that may take a very long time. I think we have known of cases where a winding-up of that sort has occupied years—and they may occur again. During all that time are you to stereotype the list of members and shareholders without reason? Apparently the Legislature thought there was no necessity for it. Why, because this necessary process is being gone through for the benefit of all the shareholders, shall an individual shareholder be prohibited from transferring his share? It seems to me that the Act plainly provides that in cases where the liquidator thinks proper there shall be no such restriction. I read these words, "except transfers made by the sanction of the liquidator," as intending to authorize a transfer for all purposes—purposes not only of advantage, but of liability—for all purposes whatsoever, including, notwithstanding the subsequent words of the section, the necessary alteration of status, in cases which may frequently happen, where such transfers ought to be permitted. If that be so, the only remaining question is, is there anything to prohibit this in any other part of the Act? So far as I know, there is nothing except s. 38—if, indeed, there is anything there, and in my judgment there is not. I quite concur

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TAYLOR, PHILLIPS, AND RICKARDS' CASES.

Rigby L.J.

in what has been said, that s. 38 is looking primarily to the commencement of the winding-up; but to my mind the section has been so framed as to obviate the necessity in all cases of referring to that period of time. Nothing can be more general than the first part of the section, which speaks of every past and present member. There is the place where you would expect the hard and fast line to be drawn, if it were intended by that section to draw a hard and fast line between the commencement of the winding-up and any other time. It appears to me that it was deliberately intended by that section not to draw the line. When we come to clause 1, which does refer to the commencement of the winding-up, that is brought in for the purpose of limiting the time outside which (going backwards) we should not come upon a past member at all. In order to be liable a past member must have been a member within twelve months before the winding-up. In my opinion, that was the sole purpose for which the commencement of the winding-up was brought in. Recognising, therefore, quite clearly, that in general, and indeed in all cases, unless you can find in the Act some right or power either in the Court or in the liquidator in a voluntary winding-up to allow a transfer of a share, the commencement of the winding-up is the period at which the liability is to be ascertained, I do not find in s. 38 any prohibition of dealings which would induce me to give a restricted construction to section 131. It appears to me that the liquidator having (we must assume properly, of course) authorized the transfer of these shares from Taylor to Phillips, and Phillips to Rickards, when you are dealing with the question who shall be on the list of contributories, you must ask who is the present member. I say Rickards. Who are the past members? I say Taylor and Phillips. I think that the list of contributories ought to be made up accordingly.

Solicitors: *Bower, Cotton & Bower, for T. H. Stephens, Cardiff; Riddell, Vaizey & Smith, for Vachell & Co., Cardiff; Few & Co., for Bythway & Son, Pontypool; Richard White, for F. Lewis, Newport, Monmouthshire; Burton, Yeates & Hart, for Johnson, Barclay, Johnson & Rogers, Birmingham.*

H. B. H.

CHANDLER *v.* BRADLEY.

STIRLING J.

[1895 C. 3617.]

1896

Nov. 17; *Dec.* 12

Settled Land—Tenant for Life—Lease for Term of Years—Receipt of Bribe from Lessee—Invalidity of Lease—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 7 *sub-s.* 2, 22, 45 *sub-s.* 3, 53, 54—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 4—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 3, 7.

C., tenant for life of a freehold house, who had mortgaged his life interest, in 1892 granted to the defendant a lease of the premises for seven years in consideration of a yearly rent of 25*l.* and covenants by the lessee to execute certain repairs and improvements. As an inducement to execute the deed the defendant had paid to C. the sum of 21*l.*, which he applied to his own use. There was no evidence that a higher rent could have been obtained. The lease purported to be granted by the mortgagees at the request of C. and by C., as tenant for life, by virtue of the Settled Land Act, 1882. C. died in 1895. In an action to set aside the lease:—

Held, (1.) that the Court, in giving relief to the beneficiaries, would not consider the question whether they had been damnified or not; (2.) that on the evidence the payment to C. could not be regarded as a fine, and the liability of the defendant was not therefore limited to paying the sum over again to trustees appointed for the purposes of the Settled Land Acts; and (3.) that, having regard to the improper payment to C., the "best rent" required by s. 7, sub-s. 2, of the Settled Land Act, 1882, had not been obtained, and consequently the lease was void.

THIS was an action by the trustees of the will of Elizabeth Chandler for a declaration that a lease of part of the trust property granted to the defendant by James Chandler, the husband of the testatrix, who was tenant for life under her will, was void against the plaintiffs, and to recover possession of the demised property.

By her will dated August 11, 1864, the testatrix, under a power of appointment vested in her, appointed and devised certain freehold property at Epsom to her husband James Chandler, during his life; and after his death she gave that property to trustees upon trusts for sale and division of the proceeds among her children living at her husband's death, and the children then living of any deceased child or children.

The testatrix died in 1866, and her husband survived until 1895. Previously to 1892 he mortgaged his life interest under

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the will to the Mutual Life Assurance Society, who entered into possession as mortgagees.

Part of the freehold property at Epsom consisted of a dwelling-house known as "The Retreat," with a paddock and garden, containing altogether 3 roods 18 perches. This adjoined other property (not comprised in the testatrix's will), where the defendant carried on business as a brewer. The house became vacant about Midsummer, 1891, and was left in a bad state of repair. The insurance company placed it in the hands of some house agents at Epsom, to whom the defendant, by letter dated February 8, 1892, proposed either to become the purchaser or to take it for seven years certain, provided it was put in thorough repair. This led to negotiations between the defendant and Mr. Manley, the actuary of the insurance company.

On March 18, 1892, Mr. Manley wrote to the defendant as follows:—

"Dear Sir,—

"The Retreat.

"I am very sorry to think that you should have reason to feel annoyed at any want of courtesy on the part of our agent. I understood from Mr. Wrightman that he had explained to you that as we shall have to give up possession on the death of Mr. Jas. Chandler, Senr., we are not in a position to treat for the sale of the property, nor do we feel justified in spending any large sum of money in putting it in repair, but that we could grant a lease for 7 years at a very moderate rental to any one who would undertake to put it in repair."

After some further correspondence Mr. Manley again wrote to the defendant on March 23, 1892:—

"I have consulted with our solicitor to-day and find that our position is a very peculiar one. Individually we are unable to grant a lease for a longer time than the life of Mr. Jas. Chandler, Senr., but that if Mr. Chandler will join we can jointly grant you a lease. Could you approach Mr. Chandler with the view of getting him to join?"

On March 24, 1892, the defendant wrote to Mr. Manley:—

"Mr. Jas. Chandler is in London at 211, High Holborn; but I can see Mr. Frank Chandler. I expect the only way to

induce Mr. Chandler to join with you in granting a lease would be by means of a consideration, as I know that would be welcome. Would you be prepared to do this if I come to terms with him?"

On the same day Mr. Manley replied: "I thank you for the address of Mr. Jas. Chandler, Senr., and I will endeavour to induce him to grant a lease. I cannot offer him a consideration as that might possibly vitiate the lease."

Ultimately Mr. Chandler consented to join in granting a lease, and the mode in which his consent was obtained was thus stated by the defendant in his evidence in chief: "I spoke to Mr. Frank Chandler to ask his father if he would sign the lease. He came a morning or two after and said his father was quite willing to sign the lease; but he thought I ought to give him something for himself. . . . I asked Frank Chandler what his father wanted: he said his father thought he ought to have 20 guineas: I said rather than go without the lease I will give him 20 guineas."

A lease was afterwards prepared by the solicitors for the insurance company and sent to the defendant, who read it through and returned it. The lease was then engrossed and sent to the defendant, who gave it to Mr. Frank Chandler to procure his father's execution of it. Mr. F. Chandler brought it to the defendant executed; and he thereupon gave him a cheque for 21*l.* payable to bearer. The cheque was handed to James Chandler, who cashed it and applied the money to his own use. The lease was dated April 27, 1892, and purported to be granted by the insurance company at the request of James Chandler, and by James Chandler "under and by virtue of the Settled Land Act, 1882, and as tenant for life under the will of Elizabeth Chandler" for a term of seven years from June 24, 1892, in consideration of the rent thereby reserved and the covenants on the part of the lessee therein contained. The rent reserved was 25*l.*, and one of the covenants on the part of the lessee was within six calendar months from June 24, 1892, to lay out and expend the sum of 100*l.* in executing to the satisfaction of the surveyor of the insurance company repairs and improvements to the demised premises, including certain

STIRLING J. repairs and improvements specified in a schedule to the lease. In pursuance of this covenant repairs and improvements were in fact executed to an amount of over 200*l*. The defendant and Mr. Manley swore that the letting was on the best terms that could be obtained; and there was no evidence given that a higher rent could have been obtained from any person other than the defendant.

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In 1883 two persons were appointed trustees of the will of the testatrix for the purposes of the Settled Land Act. One only of these was still living: he was called as a witness, and stated that he never heard of the payment of twenty guineas to the tenant for life. It was admitted that some at least of the children of the testatrix did not hear of it.

The question was whether under these circumstances the lease was good.

Grosvenor Woods, Q.C., and *Dighton N. Pollock*, for the plaintiffs. Apart from the provisions of the Settled Land Acts a tenant for life has no power to grant leases beyond the term of his life. It may be suggested that this case comes within s. 7 of the Act of 1890; but, having regard to the definition of a "fine" in s. 2, sub-s. 10 (ii.), of the Act of 1882, and s. 3 of the Act of 1890, s. 7 cannot apply. If the payment is to be regarded as a fine, it should have been paid to the trustees. Under the Act of 1882 a tenant for life may contract to grant a lease, where there is no fine, without the consent of the trustees; but if a fine is paid notice to the trustees is necessary. The lease is bad unless the money is paid to the trustees. Good faith on the part of the tenant for life and the lessee is essential, and here it did not exist: Settled Land Act, 1882, ss. 2 (7) and (9), 6, 7 (2), 21, 22, 38, 39, 40, 41, 42, 45, 53, 54; Settled Land Act, 1884, ss. 3, 4; *Duke of Marlborough* v. *Sartoris* (1); *Hatten* v. *Russell* (2); *Mogridge* v. *Clapp* (3); *Hughes* v. *Fanagan* (4); *Dowager Duchess of Sutherland* v. *Duke of Sutherland*. (5) Moreover, it cannot be said that the lease was granted at

(1) (1886) 32 Ch. D. 616.
(2) (1888) 38 Ch. D. 334.
(3) [1892] 3 Ch. 382, 390.
(4) (1891) 30 L. R. Ir. 111.
(5) [1893] 3 Ch. 169.

the "best rent" because the lessor got something from the lessee for himself: Sugden on Powers, 8th ed. 785; *Dyas* v. *Cruise* (1); *Doe* v. *Radcliffe*. (2)

Hastings, *Q.C.*, and *Micklem*, for the defendant. Dealing with the case first on the footing of the payment being treated as a fine, the fact of its having been paid to the wrong person, i.e., to the tenant for life instead of the trustees, does not avoid the transaction altogether. The lessee may be liable to pay it over again: *Mogridge* v. *Clapp*. (3) The utmost that the remaindermen can say is, that they have been damnified to the extent of 21*l*., which the defendant is willing to pay over again to the trustees.

But supposing it cannot be treated as a fine, the defendant has acted bonâ fide, and there is no suggestion that any higher rent could have been obtained for the property.

[STIRLING J. Can a lease by a trustee, coupled with the receipt by him of a bribe from the lessee, stand as against the beneficiaries?]

Yes, if they are not damnified. *Duke of Marlborough* v. *Sartoris* (4) and *Hatten* v. *Russell* (5) were both actions for specific performance, and the plaintiffs had not complied with the requirements of the statute. Different considerations apply to a case of setting aside a transaction. In *Mogridge* v. *Clapp* (3) the point was whether it was a fair thing as between tenant for life and remainderman. Here, the interests of the remaindermen will not be prejudiced. That case is in favour of the defendant.

The decision in *Hughes* v. *Fanagan* (6) would have been different if the Court of Appeal in Ireland had had the advantage of the opinion of the Lords Justices in *Mogridge* v. *Clapp*. (3) It does not, however, apply to the present case.

The *Duchess of Sutherland's Case* (7) was very special. Romer J. treated the whole transaction as a sham. Here, the lease was intended to operate, and did operate, at once.

(1) (1845) 2 J. & Lat. 460, 482.
(2) (1808) 10 East, 278.
(3) [1892] 3 Ch. 382, 395.
(4) 32 Ch. D. 616.
(5) 38 Ch. D. 334.
(6) 30 L. R. Ir. 111.
(7) [1893] 3 Ch. 169.

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If there has been a breach of trust, then the defendant, at the most, is only liable to make good to the beneficiaries what they have lost.

Grosvenor Woods, Q.C., in reply. This is a lease granted under a power, and the defendant must shew that it was validly granted. I submit that it was a fraud upon the power.

[STIRLING J. Treating the improper payment as a fine, are you entitled to more than payment of the amount of the fine to the trustees?]

That is not the true view of the case, having regard to the want of bona fides.

If it were a case of purchase the transaction clearly could not be upheld, having regard to what was said in *Mogridge* v. *Clapp*. (1)

The fact of the lessee having laid out money on the premises gives him no equity as against the remaindermen. The plaintiffs are entitled to have the lease set aside, delivery of possession of the premises, and mesne profits on the basis of the rent reserved. [He also referred to *Tildesley* v. *Harper*. (2)]

Cur. adv. vult.

1896. Dec. 12. STIRLING J. (after stating the facts):—First, what was the nature of this payment of twenty guineas? I think it was a payment to an impecunious man, intended for his personal benefit, and made with the view of inducing him to execute the lease.

Secondly, does the law permit such a payment? By s. 53 of the Settled Land Act, 1882, a tenant for life, in exercising any power under the Act, is to have regard to the interest of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. In this transaction, therefore, James Chandler was in the position of a trustee for the other beneficiaries under the will, and subject to all the liabilities of a trustee. No rule is clearer than that a trustee may not derive a personal benefit from his

(1) [1892] 3 Ch. 382, 395. (2) (1878) 7 Ch. D. 403.

position as trustee ; and it was therefore improper on his part to accept, and on the part of the defendant to make, any such payment.

The defendant stated in his evidence that he did not know the provisions of the Settled Land Act, and had no legal advisers, and that the payment was not meant as a bribe. He knew however that the lease was to be granted under that Act, for it appeared on the face of the draft lease submitted to him. He therefore had constructive notice of the fiduciary position of James Chandler. But more than that, the same draft told him that James Chandler was tenant for life, and he knew that the reason why the insurance company could not grant a lease for seven years was that their interest came to an end with the life of James Chandler. The object of procuring James Chandler to join was to prevent the lease coming to an end with his life; and these circumstances ought, as it seems to me, to have brought home to the mind of the defendant, if he reflected on the matter at all, that James Chandler in granting the lease was dealing with property which was not his own, and that to the other owners of that property he must of necessity stand in a fiduciary position. But the matter does not rest even there. Mr. Manley's letter of March 24, 1892, informed him that a payment to Chandler might vitiate the lease. When he was asked as to this, he said that he thought the risk arising from such a payment only affected the insurance company. I confess that I distrust that explanation, coming as it does from a defendant who, in answer to interrogatories sworn in January, 1896, said this : " The said cheque was not given as an inducement for the said James Chandler to grant the lease, or as part of the consideration therefor, but was a present made by me to the said James Chandler, who was then without means "—a statement entirely inconsistent with the defendant's evidence at the trial, and admitted by himself to be incorrect. Further, he made no inquiry (as any prudent man would have done) either of Mr. Manley or the solicitor of the insurance company as to what the nature of the risk was ; and if he did not know the impropriety of the payment, then, in my opinion, he deliberately shut his eyes, and took his chance

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of what the consequences might be. I think, therefore, that this case must be dealt with on the footing of his having made an improper payment to James Chandler to induce him to grant the lease. If, then, the case is to be regarded as governed by the ordinary law applicable to dealings with trustees and other persons in a fiduciary position, I apprehend that the transaction could not stand as against the persons now beneficially entitled, and the Court, in giving them relief, could not enter into the question whether or not they were damnified by what had been done.

It is said, however, that under the provisions of the Settled Land Acts the liability of the defendant is limited to that of paying to the trustees who have been appointed for the purposes of that Act the 21*l.* which was paid to James Chandler.

The argument is put in this way: s. 7, sub-s. 2, of the Act of 1882 authorises the granting of leases in consideration of a fine, which by s. 4 of the Act of 1884 is to be deemed capital money arising under the Act, and consequently, by s. 22 of the Act of 1882, is to be paid either into court or to the trustees of the settlement. It is said that this sum of 21*l.* ought to be regarded as a fine, and that on this footing the lease must be regarded as valid. It is admitted that the fine was not paid either into court or to the trustees; but it is said that the defendant did not know of the existence of the trustees, and is entitled to rely on the protection conferred by s. 45, sub-s. 3, and s. 54 of the Settled Land Act, 1882.

Reliance was also placed on the decision of the Court of Appeal in *Mogridge* v. *Clapp* (1), where a lease granted by a tenant for life who purported to demise as absolute owner was upheld, the lease being one which could have been granted under the Settled Land Act, 1882, and the lessee having acted in good faith.

Lindley L.J. in that case said (2): "Even if the plaintiff had known that there were no trustees, it would not follow that his title would be bad. Of course, if the plaintiff had, by conniving at a breach of trust, done the remainderman an injury, he would personally be liable to him for it; but even then a purchaser

(1) [1892] 3 Ch. 382. (2) [1892] 3 Ch. 395.

from him would, I think, be safe. The observations of this Court on s. 53 in *In re Marquis of Ailesbury's Settled Estates* (1) go far to shew that the title would be good even if there were no trustees, and the purchaser or lessee knew, in fact, that such was the case. However this may be, the doctrines of constructive notice ought not to be applied so as to invalidate the titles of persons dealing bonâ fide with tenants for life when exercising their powers under the Settled Land Act."

And Kay L.J. said (2): "If the lessee knew that there were no trustees, or that the tenant for life had not given the trustees notice, he might, by accepting the lease under such circumstances, be implicated in the breach of fiduciary duty by the tenant for life. It might be said that he was not dealing then in good faith with the tenant for life. Good faith in that connection must mean or involve a belief that all is being regularly and properly done; and if the lessee has not that belief, it may be said that s. 54 of the Act of 1882 does not protect him against an action by other persons entitled under the settlement. I must say that my present opinion is that if the lease were otherwise unobjectionable it could not be set aside because the lessee knew there were no trustees. It seems to me that the plaintiffs in such action might be required to shew that they were in some way damnified, and, if they could shew that, they might be entitled against both lessee and lessor to compensation as for a breach of trust, but not to have the lease, if for the best rent and otherwise unobjectionable, set aside. However, it is not necessary to give a decided opinion on this point, because I do not think that the lessee in this case had either knowledge or notice such as to make his acceptance of the lease a dealing not in good faith with the lessor."

Now, if the 21*l.* had been really agreed upon between the defendant and James Chandler as the proper amount of a fine for the granting of the lease, and some bonâ fide mistake had been made as to the proper mode of paying it, it may be that these sections of the statute and the observations of the Lords Justices would apply. I take a different view of the facts. The 21*l.* was never intended either by the defendant or Chandler

(1) [1892] 1 Ch. 536, 545. (2) [1892] 3 Ch. 401.

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to be a fine constituting capital money under the Acts; it was from first to last intended by both to be a payment for the benefit of James Chandler personally, and of no one else. Further, I am unable to come to the conclusion that the defendant acted in good faith—as it is put by Kay L.J. that he acted in the belief that everything was being regularly and properly done. On the contrary, I think he knew that he was engaged in a transaction attended with risk, and took the chance of the result. In my judgment, therefore, the sections of the Settled Land Act, 1882, to which I have referred do not protect the defendant. This being so, s. 7, sub-s. 2, of the Settled Land Act, 1882, provides that every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. I have already said that the 21*l.* paid to James Chandler is not to be regarded as a fine within the meaning of the Settled Land Act. It follows that the best rent has not been obtained, for I think that the same test is to be applied as in the case of a lease under a power; and, as is laid down in the case of the *Queensberry Leases* (1), "there is but one criterion which our Courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not, that is, whether the man who makes the lease has got as much for others as he has for himself; if he has got more for himself than for others, that is decisive evidence against him."

In my judgment, therefore, the lease is not such as is authorized by the Settled Land Acts, and is void against the plaintiffs.

Solicitors for plaintiffs: *A. R. & H. Steele.*
Solicitors for defendant: *Layton, Sons & Lendon.*

(1) (1817) 5 Dow, 293, 344.

G. A. S.

In re COSIER. HUMPHREYS *v.* GADSDEN.

C. A. 1897 *Feb.* 9, 10, 16.

[1896 C. 1204.]

Will—Construction—Hotchpot Clause.

A father on the marriage of his son in 1885 covenanted with the trustees of the son's settlement that his executors should, within six months after his death, pay to them 10,000*l.*, to be held by them upon trust for the son for his life, with remainder to his wife for her life, and after the death of the survivor upon trust for the issue of the marriage, and in default of issue in trust for the father absolutely. The father died in December, 1886, having by his will given the residue of his estate upon trust for his son and his daughter in equal shares. The share of the daughter was to be held in trust for her and her children.

The will provided that any and all sums or money which the testator had already covenanted to give to or with any child of his on his or her marriage should be taken in or towards satisfaction of the respective share of such child, or the person or persons claiming under or in substitution for her or him, under the testator's will, and should be brought into hotchpot and accounted for accordingly.

After the father's death his executors paid 10,000*l.* out of his estate to the trustees of the son's settlement, and divided the residue of the father's estate equally between the son and the trustees of the daughter's settlement, treating the 10,000*l.* as part of the son's share. In 1894 the son died without issue:—

Held, by Chitty J., that (subject to the life interest of the son's widow) the 10,000*l.* was divisible in equal shares between the son's executors and the trustees of the daughter's settlement:

Held, by the Court of Appeal, that (subject to the widow's life interest) the son's executors were entitled to the whole of the 10,000*l.*

When a testator directs by a hotchpot clause that a fund in which he himself has an interest is to be taken by a residuary legatee as part of his share of the residue under the testator's will, the hotchpot clause operates as a gift to that legatee of the testator's interest in the fund.

APPEAL against a decision of Chitty J. upon the construction and effect of a hotchpot clause contained in the will of Robert Arnold Cosier.

By a settlement dated June 8, 1885, executed upon the marriage of the testator's only son, Robert Watson Cosier, the testator covenanted with the trustees of the settlement that, in case the then intended marriage should take place (as it did),

C. A. 1897 *In re* COSIER. HUMPHREYS *v.* GADSDEN.

the executors or administrators of the father should, within six months after his death, pay to the trustees a sum of 10,000*l.*, with interest thereon at the rate of 4 per cent. per annum from the day of his death. The trustees were to hold the 10,000*l.* upon trust to invest the same, and to pay the income thereof to the son during his life, and after his death to his wife during her life (if she should survive the son) for her separate use without power of anticipation, and after the death of the survivor, in trust for the issue of the marriage as therein mentioned, and in default of issue attaining a vested interest the trust funds were, after the death of the survivor of the son and his wife and such failure of issue, to be held in trust for the father absolutely.

By his will, dated November 10, 1886, the father appointed executors and trustees thereof, and directed that they should stand possessed of the residue of his estate in trust for his son, Robert Watson Cosier, and his only daughter, Lucy Elizabeth Wheeler, the wife of Alfred Llewellyn Wheeler, in equal shares. The share of the daughter was to be invested and held in trust for her and her children in manner therein mentioned.

The will contained the following proviso: "Provided also and I declare that any and all sums of money, annuities or annual sums, and property which I have already covenanted or agreed to give, or which I may hereafter covenant or agree to give, to or with any child of mine on his or her marriage shall, in default of any direction to the contrary in writing under my hand, be taken in or towards satisfaction of the respective share of such child, or the person or persons claiming under or in substitution for her or him, under my will, and shall be brought into hotchpot and accounted for accordingly."

The testator died on December 10, 1886. After his death his executors paid the 10,000*l.* to the trustees of the son's settlement, and divided the residue of the testator's estate equally between the son and the trustees of the daughter's settlement, treating the 10,000*l.* as part of the son's share of the residue.

R. W. Cosier, the son, died on June 23, 1894, having made a will by which he appointed executors. There was no issue

of his marriage. His wife survived him, and she had since married a Mr. Poyser. Mrs. Wheeler had two children.

A question arose as to the trusts on which the 10,000*l.* (which had been paid by the father's executors to the trustees of the son's settlement) were to be held, subject to the life interest of Mrs. Poyser, and this summons was taken out to determine the question.

The plaintiffs were the executors of the son's will. The defendants were the trustees of the son's marriage settlement; the trustees of the father's will; and Mrs. Wheeler and her children.

The summons asked the Court to determine—(1.) Whether, in the events which had happened, the 10,000*l.* covenanted to be settled by the father was held by the trustees of the settlement (subject to the life interest of Mrs. Poyser) upon trust for the plaintiffs as the executors of the son, or as part of the residuary estate of the father.

(2.) How, if the 10,000*l.* formed part of the residuary estate of the father, it was to be divided between the estate of the son and Mrs. Wheeler and her children.

Chitty J. made a declaration that in the events which had happened the 10,000*l.* was held by the trustees (subject to the life interest of Mrs. Poyser) as part of the residuary estate of the father, and that it was divisible in moieties between the estate of the son of the one part, and Mrs. Wheeler and her two children and any future child or children of hers, in equal shares, of the other part.

The son's executors appealed.

Levett, Q.C., and *Edward Ford*, for the appellants. The purpose of a hotchpot clause is to produce that equality among the objects of a testator's bounty which without it the law would not have effected; and its insertion shows that the testator intended equality: *Lord Chichester* v. *Coventry*. (1) The clause should be construed so as to produce equality. The result of Chitty J.'s decision is that the daughter will get 10,000*l.* more than her brother. The effect of the hotchpot

(1) (1867) L. R. 2 H. L. 71, 95.

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clause properly construed is to give the father's reversion in the 10,000*l.* entirely to the son.

Farwell, Q.C., and *J. G. Wood*, for Mrs. Wheeler and her children. The reversionary interest under the son's settlement was clearly part of the father's estate. The general intention to provide for equality must not be strained too far. The hotchpot clause is in a common form. The testator had covenanted to give the 10,000*l.* *with, not to*, his son. There is no presumption that the father intended to give the son an absolute interest, when he had no such intention in the case of the daughter. The 10,000*l.* which he had covenanted to pay to his son's trustees was to be taken into account in dividing the estate. The son did not take the 10,000*l.* and the testator knew that the trustees took it. The word "taken" only means "reckoned"—taken into account—as against the son. The words of a hotchpot clause cannot be enlarged into a new gift. The appellants really seek to make the clause operate twice over. The clause might as well be struck out of the will. The estate in the hands of the executors was 52,000*l.* After paying the 10,000*l.* to the son's trustees there remained 42,000*l.* This being divided equally, taking the 10,000*l.* into account as part of the son's share, 26,000*l.* had to be paid to the daughter's trustees and 16,000*l.* to the son's executors. After this had been done the reversion in the 10,000*l.* (subject to the life estate of the son's widow) fell into the residue of the father's estate, and this ought to be divided in equal shares between the son's executors and the daughter's trustees. This is the effect of the decision of Chitty J. The object of a hotchpot clause is to cut down a prior gift and to produce equality. The primâ facie meaning of "taken" in such a clause is "deemed to be taken." It is a mere matter of account. Probably the testator had forgotten his own ultimate contingent reversion in the 10,000*l.* He may have intended equality only in the event of both the son and the daughter having children. As it is, the son's share will by his will go to a stranger.

Gordon Fellowes, for the trustees of the son's settlement.

Levett, Q.C., in reply. "Give" is not equivalent to "cove-

nant to pay." Whatever had been "given" by the testator to the son came out of the 10,000*l.*; whatever had not been given to him was to be part of his moiety of the residue. There was in the son's settlement no covenant by the testator to "give" anything to the son; the covenant was to pay the 10,000*l.* to the trustees of the settlement. The two life estates were the only "gift." The reversion is not included in the hotchpot clause.

The testator's reversion was not given by him "to or with" his son. To "take" implies to "keep." A hotchpot clause must not be used to bring about inequality.

Farwell, Q.C., referred to the form of hotchpot clause given in Davidson's Conveyancing Precedents, 2nd ed. vol. 4, p. 148, No. 6.

Levett, Q.C. That form shews that "advance" and "gift" are different things.

Cur. adv. vult.

Feb. 16. Lindley L.J. This is an appeal from an order of Chitty J., and the question raised by the appeal is, What effect has a gift by the testator to his son of half of his residuary estate, followed by a hotchpot clause, on a previous settlement by the testator on his son's marriage of 10,000*l.*, in which the testator had a contingent reversionary interest? [His Lordship referred to the facts as above stated, and continued:—]

Chitty J. has decided in favour of the daughter's contention. The learned judge says that the result is unexpected, but he has held it to be the result of the true construction of the hotchpot clause. I confess I cannot agree with him.

The hotchpot clause is in the usual form, at least, I can find nothing peculiar in it; and, whether it be looked at broadly, without minutely criticising the words in which it is expressed, or narrowly, with a minute criticism of them, the result appears to me to be the same, and to be quite different from that arrived at by the learned judge.

What is the object of every hotchpot clause? It is simply to prevent a person to whom a testator has left a share of his estate, and who has been advanced in the testator's lifetime,

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from obtaining, by the combined effect of the bequest and the advance, more of the testator's property than he intended the legatee should have. But the effect of the order appealed from goes far beyond this: its effect is to deprive the son of 5000*l.*, part of the one-half of what the father clearly intended him to have, and to give that 5000*l.* to the daughter, in addition to the sum which puts her on an equality with her brother. A construction of a hotchpot clause which brings about such a result as that is, to say the least of it, very startling, and renders a close examination of the words in which it is expressed necessary before we can be driven to accept so very strange a result.

I turn to the words, and I agree with the counsel for the respondents that they have to be applied to the 10,000*l.* which the testator covenanted to pay to the trustees of the son's marriage settlement, to be held by them upon the trusts thereby declared. The ultimate trust in default of children of the marriage was for the testator himself. The testator had, therefore, a contingent reversionary interest in this sum which he could dispose of by his will, and could leave to his son, if he chose. Having given half of his residuary estate, including this reversion, to his son, the testator in effect says that this sum of 10,000*l.* "shall be taken in or towards satisfaction" of the share of the son under the will, "and shall be brought into hotchpot and accounted for accordingly."

I pause to inquire, Who is to take this sum? Who is to bring it into hotchpot, and who is to account for it? The answer can only be, the son; it cannot be the trustees, for they are creditors of the testator; they take nothing under the will, and are not in a position to take the 10,000*l.* in satisfaction of anything under the will, nor to bring that sum into hotchpot and account for it accordingly. But, if a testator, having an interest in a sum of money, directs that a legatee of a share of his residue shall take that sum on account of that share, and the legatee does so, as the son did here, the whole sum is taken out of the testator's estate, and, so far as the testator is concerned, that sum ceases to be part of his estate, and becomes part of what is given to the son. The sum so given is no

longer the testator's, and can only come back to him by gift or purchase from the son.

It was contended that this is to render a hotchpot clause operative as a gift, which is not its function. But that is only a half truth, and is very misleading. A hotchpot clause in a will has always to be construed together with some other clause which is a clause of gift, and the question always is, What is the true effect of the clause of gift and of the hotchpot clause which has to be construed with it? The combined effect of the two clauses is always, so far as I know, to pass to the legatee of what is given, the testator's interest, if any, in that which is to be brought into hotchpot. Take the very common case put by my brother Rigby in the course of the argument. Suppose a father lends his son 1000*l.*, and then bequeaths to him a share of his residuary estate, and directs that the 1000*l.* shall be brought into hotchpot. What is this but a gift to the son of the 1000*l.*, as part of the share given to him?

It was also urged that the hotchpot clause is only a direction to bring into account—a direction how the accounts are to be made up by the executors or trustees of the will. But accounts are of no use except so far as they represent realities, and the reality to be represented is that the whole 10,000*l.* is given by the testator to the son, as part of his share of the residuary estate. That which is so given includes all that the testator could give, i.e., the whole of his contingent reversionary interest in the sum in question.

If the trustees of the will had not deducted the whole 10,000*l.* from the son's share when they divided the residue, they would have paid him too much, and there would be a mistake to rectify. But, like business men, they very properly did deduct the whole sum from his share when they divided the residue, and, as between the testator's estate and the son, the whole of the 10,000*l.* then became the son's property and he had nothing more to account for, and the ultimate trust in the settlement ceased to be a trust for the testator, and became, by virtue of his will, a trust for the son, his executors, administrators, or assigns.

In my opinion the order appealed from is wrong and must

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be discharged, and there must be a declaration that the plaintiffs, as executors of the son, are entitled to the 10,000*l.*, subject to the life interest of the son's widow therein.

The costs of the summons and of the appeal ought to be paid by the respondents, the Wheelers.

A. L. SMITH L.J. I have read the judgment of my brother Lindley, and I entirely agree with it.

RIGBY L.J. I am unable to agree with the conclusion arrived at by Chitty J. Arguments have been pressed upon us on the supposition that the primary meaning of the hotchpot clause is opposed to the appellants' contention. As, however, in my judgment the appellants' case is based upon and justified by the primary meaning of the clause, it seems to me quite unnecessary to refer to those arguments.

The respondents' case seems to me to rest entirely upon the assertion—and the mere assertion, for I have heard no reason, and confessedly there is no authority, to justify it—that the important words "shall be taken in or towards satisfaction" cannot be words of gift, but must be construed as meaning "shall for the purpose of calculation only, and not by way of bounty or gift, be taken in or towards satisfaction." I can see no justification whatever for modifying the phrase under consideration in so vital a manner.

If the respondents' counsel had confined themselves to the statement that there may be, and often are, cases in which similar words in hotchpot clauses can have no greater operation than that to which they claim to confine them in the present case, that statement would, I think, have been correct, but it would not have assisted them in the least.

The limited operation of the words in such cases arises, not from any change in their meaning, but from the testator's want of disposing power over the subject-matter.

It is not only with reference to hotchpot clauses that such cases arise. The plainest words of gift, wherever they occur, can operate directly only to the extent of the testator's power to give, though they may have an important indirect operation, as, for instance, in raising a case of election.

When a testator gives a direction that a particular thing shall be taken by any one in or towards satisfaction of his share, and the thing spoken of exists and belongs to the testator, I cannot doubt that, according to the plain and obvious meaning of the words, he gives that thing to the legatee, and this plain meaning is not controlled or varied, but is rather corroborated, by the addition of such words as, "and shall be brought into hotchpot and accounted for accordingly." If, and so far as, the testator cannot give, the words of gift must be inoperative in their primary meaning, though they may have a secondary meaning.

Suppose a testator to have given money by way of bounty, say, for the education of a child. The money is spent and gone; the child is in no way liable to repay it; and it is impossible for the testator to make it the subject of a gift.

Suppose, however, that the testator has lent a child money, say, 10,000*l.*, instead of giving it, and has, to make the transaction clear, taken from the child a bond for repayment. Or, suppose again, that he has lent the money to a stranger on mortgage. If the testator says, "I declare that the money spent by me on my son's education shall be taken in or towards satisfaction of his share," it is plain that, as to that particular subject-matter, there can be no gift. In each of the other cases the 10,000*l.* is an existing asset of the testator, available for the payment of creditors, but, subject to their claims, entirely at the testator's disposal. If then he says, "I declare that the 10,000*l.* owing to me on bond by my son, or the 10,000*l.* lent by me on mortgage to A., shall be taken in or towards satisfaction of my son's share under my will," it would, in my judgment, be repugnant to common sense to say that the son was not released from the debt in the first case, and made the owner of the mortgage debt in the second. This, however, is the same thing as saying, that the words operate as words of gift. These are extreme cases, but there are, of course, intermediate cases, of which the present is one, where the testator can dispose of part, but part only, of the subject-matter.

The true rule must be, that, if, and so far as, the words can

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operate as words of gift, that is, according to their primary meaning, they must do so.

In this particular case, if it had been necessary, in order to avoid inequality where equality was presumably intended, I should have been disposed to accept Mr. Levett's argument, that by the words "sums of money which I have covenanted to give" the testator must have meant sums of money which he had covenanted to give effectually—that is, so as to take them out of his estate. Certainly I could not think that the word "give" in such a context would be satisfied by a payment to trustees, who take no beneficial interest for themselves.

I prefer, however, to take that which seems to me the literal meaning of the first part of the hotchpot clause, and to follow the learned judge in treating the words as including the whole sum of 10,000*l.* mentioned in the marriage settlement. The operative words will then run thus: "I declare that the 10,000*l.* comprised in my son's settlement shall be taken in or towards satisfaction of his share under my will." The words cannot operate to take away the wife's life interest, nor, if there had been issue, could they have modified their interest. But, to the extent of the testator's own interest, whatever it might turn out to be, the words will operate according to that which is, I repeat, in my judgment, their primary meaning.

The appeal must, therefore, succeed.

Solicitors: *Beyfus & Beyfus; Flower, Nussey & Fellowes.*

W. L. C.

GUARDIANS OF WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE SOCIETY.

[1896 W. 1643.]

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[1896 W. 1731.]

C. A. 1896 NORTH J. *Nov.* 3, 4; C. A. 1897 *Feb.* 8, 20.

Guardians of the Poor—Loan for Term of Years—Redemption before End of Term—Consent of Lender—Poor Law Loans Act, 1871 (34 & 35 *Vict. c.* 11), *s.* 2.

Held, by Lindley and Rigby L.JJ. (dissentiente A. L. Smith L.J.), that guardians of the poor who have, since April 24, 1871 (the date of the passing of the Poor Law Loans Act, 1871), borrowed money which, by their contract with the lender, is made repayable by equal half-yearly instalments extending over a fixed term of years, cannot, even with the authority of an order of the Local Government Board under s. 2 of the Act, compel the lender to accept against his will repayment of the loan otherwise than in accordance with the contract.

Decision of North J. reversed.

Appeals against a decision of North J. upon two special cases stated by consent for the opinion of the Court, pursuant to Order xxxiv., r. 1, of the Rules of the Supreme Court.

The question raised was whether guardians of the poor who had, since the passing of the Poor Law Loans Act, 1871, borrowed money on the security of the common fund of the union, under a contract to repay the loan by equal half-yearly instalments extending over a term of years, could compel the lenders against their will to accept repayment otherwise than according to the terms of the contract.

By an indenture made in the form authorized by s. 6 of the Union Loans Act, 1869 (32 & 33 Vict. c. 45), with immaterial variations, and dated January 26, 1876, the guardians of the West Derby Union charged the common fund of the union with the repayment to the trustees of the Metropolitan Life Assurance Society of a sum of 10,000*l.* (lent out of the funds of the society to the guardians), and interest thereon at $4\frac{1}{4}$ per

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cent. per annum, to be paid in sixty equal half-yearly instalments of 296*l.* 9*s.*, and it was provided that nothing in the indenture contained should prevent the trustees from receiving the repayment of the whole or any part of the 10,000*l.* at any time before the day of payment of the last instalment, if willing so to do.

The 10,000*l.* was the second instalment of a sum of 30,000*l.*, duly authorized by the Local Government Board, advanced by the Metropolitan Society to the guardians. The remainder of the 30,000*l.* was secured by deeds of charge similar in form to the above-stated indenture, and respectively dated September 29, 1875, January 10, 1877, and January 9, 1878.

In January, 1882, the guardians executed a deed similar in its material particulars to secure to the trustees of the Metropolitan Society the repayment of a loan of 5000*l.*, and interest thereon at the rate of $4\frac{1}{4}$ per cent. per annum, by sixty equal half-yearly payments.

On September 21, 1895, the Local Government Board made an order under s. 2 of the Poor Law Loans Act, 1871 (1),

(1) The preamble of the Act is as follows:—

"Whereas under the Poor Law Amendment Act, 1834, and the subsequent Acts amending and extending the same, boards of guardians and boards of management respectively have been and are empowered to borrow money for the purposes of the unions, parishes, and districts for which they act, to be repaid by annual instalments within a certain period, which by the Poor Law Amendment Act, 1868, and the Union Loans Act, 1869, has been settled at thirty years:

"And whereas several boards of guardians and boards of management had contracted loans prior to the passing of the said Act of 1869, and it is desirable that they should be empowered to avail themselves of the provisions therein contained in this respect, and that all boards of guardians and boards of management should have the additional power in relation to loans heretofore or hereafter to be contracted, herein set forth."

By s. 1, "Where any board of guardians or board of management shall, under the order of the Poor Law Board, have contracted any loan before the passing of the Union Loans Act, 1869, to be repaid by annual instalments not exceeding twenty, and the same shall not have been wholly repaid at the passing of this Act, such board of guardians or board of management, as the case may be, may, with the consent of the person or persons legally entitled to receive the repayment of such loan, and with the approval of the Poor Law Board, extend the time for the repayment of the outstanding balance of the said loan for such a period as would have elapsed if the loan had been originally granted

authorizing the guardians to redeem the balances then remaining unpaid of certain outstanding loans, specified in a schedule to the order, including the above-mentioned loans from the Metropolitan Society, and for that purpose to borrow such sums as might be necessary, with interest thereon at 3 per cent. per annum. This order was made without any previous notice to the Metropolitan Society. The guardians, on November 20, 1895, served notice on the Metropolitan Society of their intention to pay off the balances of the above-mentioned loans on May 20, 1896. The society objected to the loans being paid off otherwise than by the instalments in which the guardians had contracted to pay them.

The first of the two special cases was between the guardians, as plaintiffs, and the Metropolitan Society and the trustees

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for a period not exceeding thirty years, and make such extension either by indorsement on the security executed by them or by a separate deed; and the charge originally created as thus extended shall continue to be a valid charge on the fund charged with the repayment at the time of the passing of this Act, and all exemptions and privileges to which the original charge was entitled shall apply to this extension: Provided that where several loans shall have been obtained from the same person or persons, and they are redeemed at the same time, the balances may be consolidated; and if a new loan be obtained the whole may be repaid within thirty years of the time at which the latest loan was contracted."

Sect. 2: "If any guardians or managers having borrowed or hereafter borrowing money under the authority of the Acts referred to shall be able at any time to obtain a loan at a lower rate of interest than that secured by the charge previously made by them, they may apply to the Poor Law Board for an order to enable them to redeem the balance of the loan, and to borrow so much money as may be necessary for that purpose; and if the said board shall issue their order in that behalf the said guardians or managers may borrow the requisite amount to redeem such balance, and charge the fund to which the original loan was charged with the repayment of this additional loan in so many instalments as shall be outstanding at the time when the loan is redeemed, but not more: Provided that in the event of any loan outstanding at the time of the passing of this Act, no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing."

Sect. 3: "Loans may be repaid by half-yearly instalments, and where they may have been contracted to be repaid by annual instalments, they may, with the consent of the lenders, be repaid by half-yearly instalments of the principal and interest."

The Local Government Board has since been substituted for the Poor Law Board.

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for them of the above mortgages, as defendants, to determine whether the plaintiffs were entitled to redeem the mortgages by paying the outstanding balances of principal, in accordance with the notice given, without the consent of the defendants.

The second special case was between the guardians, as plaintiffs, and the trustees of the Friends' Provident Institution, as defendants, raising the same point of law in relation to some loans made since April 24, 1871, by that institution to the guardians.

The special cases came on for hearing before North J. on November 3, 1896.

Cozens-Hardy, Q.C., Swinfen Eady, Q.C., R. J. Parker, and *W. E. Cleaver,* for the plaintiffs. The enacting part of s. 2 of the Act of 1871 gives the guardians power, with the sanction of the Local Government Board, to borrow money for the purpose of paying off their existing loans. This implies a right to pay off the loans, except so far as the rights of the lenders to object are maintained or given by the proviso. The proviso is to the effect that *old loans* are not to be paid off without the consent of the lenders. The necessity for such a proviso shews that it was not intended that lenders since the Act of 1871 should have a right to object to their loans being paid off. The view that a distinction is intended to be drawn in this respect between loans contracted before and loans contracted after the passing of the Act is confirmed by s. 3, which provides for the alteration of a contract of loan with the consent of the lender in certain cases, whether the loan was made before or after the passing of the Act of 1871.

The actual form of the contract cannot affect the question, for a public body cannot contract not to exercise its statutory powers: *Ayr Harbour Trustees* v. *Oswald.* (1)

Sir R. T. Reid, Q.C., and *Danckwerts,* for the Metropolitan Society; and *Sir R. T. Reid, Q.C.,* and *Crawley,* for the Friends' Provident Institution. It would be very unreasonable to enact that the borrowers of loans for fixed periods, which they contract to repay by instalments, should be able to pay them off at

(1) (1883) 8 App. Cas. 623.

their own option only, especially as no time is fixed for their giving notice to pay off. It is unnecessary to give to the proviso the extensive meaning attributed to it by the guardians. There were cases in which, previously to the Act of 1871, the lenders had contracted to accept repayment of the amount outstanding before the expiration of the fixed term, and to such loans the proviso would apply, and it ought to be restricted so as to apply to such cases only.

In the next place, the operative part of s. 2 is unambiguous. It merely enacts that the guardians may borrow for the purpose of repaying a loan: it does not give the guardians a new right to repay; and a proviso cannot, by mere implication, expand the meaning of an enacting clause: *Smithett* v. *Blythe* (1); *Mullins* v. *Treasurer of County of Surrey* (2); *Fryer* v. *Morland* (3); *London Joint Stock Bank* v. *Mayor of London* (4); *Hough* v. *Windus*. (5)

It is not necessary, in construing the Act, to give any effect to the proviso; it may well have been unnecessary, and inserted ex abundanti cautelâ: *Mollwo, March & Co.* v. *Court of Wards*. (6)

Cozens-Hardy, Q.C., in reply.

NORTH J. In my opinion the contention of the guardians is right.

In 1869 the Union Loans Act was passed, behind which I do not think it is necessary for me to go. That Act is intituled "an Act to amend the law relating to the repayment of loans to poor law unions." By s. 5 it provided that any sum or sums borrowed by the guardians of any union or parish after the passing of the Act might be repaid "(1.) by thirty equal annual payments of the principal sum borrowed, with the interest on the balance remaining unpaid each year: (2.) by such equal annual payments as, reckoning principal and interest together, will repay the sum borrowed within thirty years." Then, by s. 6, "every security for money borrowed under the

(1) (1830) 1 B. & Ad. 509.
(2) (1881) 7 App. Cas. 1.
(3) (1876) 3 Ch. D. 675, 685, 686.
(4) (1875) 1 C. P. D. 1.
(5) (1884) 12 Q. B. D. 224, 229.
(6) (1872) L. R. 4 P. C. 419.

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authority of any order of the Poor Law Board may be made according to the following form, or as near thereto as the circumstances of the case will admit." That same form was authorized by older Acts as far back as 1851, and it is preserved in this Act.

[After stating generally the nature of the statutory form, and referring to the provision for repayment before the expiration of the term of the loan, his Lordship continued :—]

I do not see to what that provision can apply, unless it is to enable the lenders to accept repayment without inquiring into the power of the persons who are acting under statutory authority to make the repayment; that is, the fixing of the particular times at which the payments are to be made is not to prevent the lenders from accepting repayment and giving a good receipt at an earlier date, if they are willing to adopt that course. That was the security contemplated in 1869.

Then in 1871 a further Act was passed containing new powers. Independently of the Act of 1871, the guardians could not, in such a case as the present, repay the loan in any other way than that provided for, namely, in the instalments mentioned in the scheduled security. [His Lordship referred to the preamble and to s. 1, and continued :—] Then s. 2 is much more important, because it applies to moneys already borrowed or to be borrowed after the passing of the Act. [His Lordship read the section up to the proviso, and continued :—]

What is contemplated is the redemption of a loan, and the borrowing of the money necessary for that purpose; and under that section money cannot be borrowed at all, if it is not borrowed for the purpose of redeeming a loan. After the passing of this Act the guardians borrowed the sums now in question, and they have, no doubt, from that time down to the present, been paying the instalments due under the security. Now they propose to borrow money to redeem some of their loans, and, in particular, the loans made by the defendants after the passing of the Act of 1871, and with full knowledge of its provisions. The first question is whether, under the enacting words of s. 2, independently of the proviso, the plaintiffs

can borrow money, and can apply it for the purpose for which it is borrowed, against the will of the lender.

Now the objection made by the defendants is that, although no doubt a power is given to the guardians to borrow money and to apply it in paying off the loans in question, the power can be exercised only if the lenders consent to receive their money. Is that the meaning of the section as it stands? So far as I have read it, it is not confined to borrowing money for the purpose of paying mortgagees who consent to receive their money. The words are large enough to apply to the paying off all loans, whether the lenders do or do not consent. Suppose the section to be worded thus: "The guardians, in order to obtain money at a lower rate of interest than the existing rate, may apply to the Poor Law Board for an order to authorize them to redeem the balance of the loan, and to borrow so much money as may be necessary for that purpose, and to apply the same accordingly." Now let me add the words, "whether the loans were contracted before or after the passing of this Act." What would that phrase add to the force of the words which have gone before? It might perhaps clear up a doubt, but it does not add anything to the words which have gone before. It only shews that they are large enough to cover two cases as to which there might have been a dispute if those words of explanation had not been inserted. It is clear, therefore, as a matter of construction, that the power to borrow money to pay off loans is not confined to loans made after the passing of the Act. But I agree that, if there were nothing else to explain the meaning, I should have held, as a matter of construction, that those words ought not to be applied to cases in which the rights of other persons might be affected, namely, cases in which money had been borrowed before the passing of the Act, but that they ought to be confined to cases in which there were no rights which could be interfered with, inasmuch as the lenders knew the law at the time when they advanced their money. As a matter of construction, I think I should have held that absent persons—mortgagees who had advanced their money before the Act was passed—were not included, not because the words were not large enough to apply to them, but

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because, on general principles, such persons ought not to be affected in the absence of words making it clear that the Legislature intended they should be.

But there is a proviso to s. 2, and the whole question in dispute turns, as it seems to me, on the construction of this proviso. I come to the conclusion at which I have arrived upon the construction of that proviso as explained by the words of the enacting part of the section, which are large enough to include persons lending money at any time, and therefore to apply to the present defendants. Then the proviso says that "in the event of any loan outstanding at the time of the passing of this Act, no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing." What can that mean but that persons to whom loans are due, which are outstanding at the time of the passing of the Act, are to be in a different position from persons whose loans were only made after the passing of the Act? I do not see how any other construction is possible. The proviso draws a distinction between the two classes, and says that those whose loans were made before the Act of 1871 are not to be redeemed without their consent. It is suggested that the proviso was inserted ex abundanti cautelâ particularly for the protection of such persons, but that those who lent their money after the passing of the Act are, according to the true construction, in exactly the same position. I do not think that is the true construction. I think the proviso applies particularly to protect those persons who lent their money before the Act; but it is impossible to read the clause without seeing that those persons whose money was only advanced after the passing of the Act are not to stand in the privileged position conferred on the others, namely, that they are not to be compelled to take their money unless they are willing to do so. I think this view receives strong confirmation from the language of s. 3 which follows immediately afterwards. It provides that "loans may be repaid by half-yearly instalments, and where they may have been contracted to be repaid by annual instalments, they may, with the consent of the lenders, be repaid by half-yearly instalments of the principal and interest." That section, therefore,

provides that in certain cases the contract which has been entered into may be departed from with the consent of the lenders. That is not confined to loans made before the passing of the Act, but it extends to loans made at any time; and in that case persons who advanced their money after the passing of the Act are expressly protected. When I find that in the proviso with which s. 2 ends the protection given is confined to persons who have lent their money before the passing of the Act, I think it means what it says, and does not apply to persons who lent their money after the passing of the Act.

Under these circumstances it seems to me that the proviso to s. 2 only confirms my view of the enacting part of the section, and that persons who lent their money after the passing of the Act can be redeemed without their consent.

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From this decision the mortgagees appealed. The appeal was heard on February 8, 1897.

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Sir R. T. Reid, Q.C., and *Danckwerts*, for the Metropolitan Society. The decision of North J. produces a very one-sided result. If the rate of interest should fall, the guardians can compel the lenders to be paid off; whereas, if the rate of interest should rise, it was not even suggested that the lenders could require repayment otherwise than according to the contract. Before the Act of 1871 guardians had no power to borrow money for the purpose of paying off a previously existing loan. There was nothing to prevent them from paying off, by means of any moneys which they might have, any loan before the appointed time for repayment, with the consent of the lender, and there was nothing to prevent guardians from stipulating for a right to redeem a loan upon notice. The object of s. 2 of the Act of 1871 was to empower guardians to borrow money for the purpose of paying off loans. The proviso at the end of s. 2 cannot enlarge the scope of the prior enacting part of the section. The enacting part does not say that a lender can be compelled to accept repayment before the appointed time. "No such redemption" means "no redemption by money borrowed for the purpose." Before the Act

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there may have been lenders to guardians who had agreed that they would accept repayment at any time upon six months' notice. Such persons knew that the guardians could not borrow money for the purpose of paying them off, and they may well have been willing to run the very small risk of the guardians being in a position to pay them off out of casual savings. The object of the proviso was to protect such persons against the risk of being after the Act paid off by means of money borrowed for the purpose—a risk which they had not contemplated when they advanced their money. This is the object and meaning of the proviso. Why should it be tortured into giving power to guardians to break their statutory contracts? In s. 3, which deals with existing as well as future contracts, the Legislature has been careful to preserve existing rights even in so small a matter as the substitution of half-yearly for yearly instalments. This confirms the above view of the construction of s. 2. The proviso may have been inserted only ex abundanti cautelâ. It is always in the power of guardians to stipulate with a lender for a right to redeem the loan at any time before the expiration of the term. The plaintiffs have not done this.

Cozens-Hardy, Q.C., *Swinfen Eady, Q.C.*, *R. J. Parker*, and *W. E. Cleaver*, for the guardians. The guardians are not seeking to break their contract. The Act of 1871 is part of the contract. The contract is made subject to the provisions of the Act, and the only question is, what does the Act mean? The rate of interest has fallen upon all mortgage securities. The Act deals with a well-known form of security, which conferred no right upon the borrower to redeem before the expiration of the term for which the loan was made. Sect. 2 (independently of the proviso) enables guardians as regards all loans, whether made before or after the passing of the Act, to apply to the Poor Law Board for an order to authorize them to redeem the unpaid balance of the loan, and to borrow money for the purpose. This is enough for our argument; it is not necessary for us to rely upon the proviso. The proviso protects only lenders before the Act. It would have been senseless if the enacting part did not confer a right to redeem all

loans without the consent of the lenders. The proviso is not limited to mortgages which contain a stipulation for the right to redeem before the expiration of the term. The statutory form of security contains no power for the guardians to redeem before the end of the term.

Sir R. T. Reid, Q.C., in reply. The statutory form may be varied.

Sir R. T. Reid, Q.C., and *Crawley*, for the trustees of the Friends' Provident Institution.

R. J. Parker, for the guardians.

Cur. adv. vult.

Feb. 20. LINDLEY L.J. The question raised by these appeals is whether poor law guardians, who, since 1871, have borrowed money on the security of poor-rates, upon the terms of paying off the principal, with interest at an agreed rate, by equal annual instalments extending over thirty years, can compel the lenders to accept payment of the unpaid principal sum whenever the guardians can borrow the amount necessary for the purpose at a lower rate of interest than that which they agreed to pay. North J. has decided that they can do so under the powers conferred upon them by the Poor Law Loans Act, 1871, s. 2. From this decision the lenders have appealed. It is conceded that the guardians have no such power apart from the statute in question; but it is said that the practical effect of that statute is to introduce into every mortgage of poor-rates, made after the passing of the statute, a provision enabling the guardians to pay off the mortgage at any time, if they can borrow money at a lower rate of interest than that mentioned in the mortgage. It is contended that this is no hardship on the lenders, because they must be taken to know the law, and to have made their bargains with reference to it. No one pretends that the lenders can call in the money, if it is to their interest to do so. The bargain, therefore, if it really is as the guardians contend, is a very one-sided one, and one which lenders would not make without raising the terms on which they would otherwise be willing to lend. However, I agree that, if the Legislature has imposed upon the lenders the obligation of accepting their

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money upon terms not expressed in their security, they must accept it upon those terms, whether they consider them harsh or unfair or not. They should have thought of that before they lent their money. But, unless the Legislature has clearly imposed such an obligation upon them, they may well complain of the hardship and unfairness of such a departure from the plain language in which their contract and security are expressed. Before examining the Act, I pause to ask, what must be found in it to confer upon the guardians the right to pay off a mortgage on terms other than those expressed in it? A power to borrow in order to pay off is by no means enough, for such a power imposes no obligations, either on persons to lend or on lenders to be redeemed. Such a power assumes that persons can be found willing to lend, and also that lenders are willing, or have agreed, to be redeemed as desired. In order to support the contention of the guardians there must be found some enactment imposing upon the lenders an obligation to take the principal due to them upon other terms than those mentioned in their express contract. Unless this obligation is clearly imposed upon them by the Legislature, it cannot be imposed at all. To impose such an obligation by an inference from language which does not clearly impose it appears to me to be wrong in principle, unless the inference is what is called a necessary inference—i.e., unless the language relied upon can have no other meaning. [His Lordship read s. 2.]

Now, apart from any inference drawn from the proviso to this section, there is nothing whatever to impose any obligation on lenders of money to guardians to accept repayment otherwise than upon the terms mentioned in their securities. The section simply extends the powers of guardians to borrow. Such a power was wanted, for, even if lenders agreed that they would accept, or were willing to accept, payment otherwise than by instalments, the guardians had no power to borrow money in order to pay them off. It is to be observed that the application to the Poor Law Board for power to redeem and borrow for the purpose is made without notice to the lenders, who are not consulted or heard by the board. The Act does not protect them in any way, not even by requiring six months'

or other reasonable notice so as to give them time to find another investment. Further, if an order is obtained from the board, all that the Act says is that the guardians may borrow the money necessary to redeem, and charge it on the fund charged by the original loan. All this merely extends their powers; no right to pay off the lenders against their consent, and on terms not expressed in their contracts, is conferred on the guardians. No obligation whatever is imposed on the lenders by the enacting part of the section. I pass to the proviso. It is in terms confined to loans made before the Act passed, and is clearly inserted to protect the persons to whom such loans may be owing from being paid off without their consent by means of money borrowed under the powers of the Act. This is what the proviso says, and this is all it says. It says nothing about loans made since the Act. It is contended that the necessary inference is that such loans can be paid off without the consent of the persons to whom they are owing, and although there is nothing in their securities to compel them to take their money otherwise than by instalments. I am quite unable to see the necessity for drawing any such inference. The proviso is consistent with other views, from which no such inference can be drawn. In the first place, it may have been inserted, not because it was plain that the enacting part of the section did apply to loans made before the Act, but because persons who were regarding the interests of the owners of such loans were afraid that such a construction might be adopted, and thought it prudent to remove all doubt upon the point by introducing language the meaning of which could not be mistaken. Another explanation was suggested by counsel for the appellants—namely, that the proviso was inserted in order to prevent the powers of the Act from being used to pay off lenders who had agreed before 1871 to accept payment out of any moneys which the borrowers might happen to have applicable to the purpose of paying off loans, but which moneys could not before 1871 have been obtained by borrowing for that purpose. This explanation of the clause may be correct. The form of security given in s. 6 of the Union Loans Act, 1869, to which I shall again refer presently, shews that redemption

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otherwise than by yearly instalments was contemplated, and I suppose that such redemptions did in fact occasionally take place, but, of course, only with the consent of the lenders. I do not know whether before the Act of 1871 loans were in practice expressly made redeemable otherwise than by instalments; but, whether they were or not, they might have been, and I cannot therefore reject this explanation of the proviso as wholly unworthy of consideration. It would have the effect suggested in the cases supposed, if any such there were. The anxiety of the Legislature not to affect the rights of the owners of loans made before 1871 is apparent, not only from the proviso in s. 2, but from ss. 1 and 3 also. But s. 3 also shews that the Legislature left the borrowers and lenders to make their own bargains after the Act passed, and did not intend to interfere with those bargains without the consent of the lenders. This section enables loans to be repaid by half-yearly instalments, instead of by annual instalments as under the previous poor law loans enactments. But this s. 3, which applies to loans made after 1871 as well as to loans made before, expressly says that such half-yearly repayments are only to be made with the consent of the lenders. Now it seems to me incredible that such a small alteration as this in the express terms of a written contract can only be made with consent, and yet that the lenders shall be liable to be paid off at any moment without notice, although no bargain to that effect is to be found in the security given to them. Again, it is to be observed that the form of security given by the Union Loans Act of 1869 (32 & 33 Vict. c. 45), s. 6, is left as it was, and the proviso in that form would hardly have been continued without alteration if the Act of 1871 had (as contended) made it part of every bargain that the guardians should be at liberty to pay off the loan at any time, if they could obtain money for the purpose. The proviso in the form is, that nothing contained in the charge given to the lenders shall prevent them from receiving repayment of the loan before the day of payment of the last instalment, if willing so to do. With such a clause still in the form the Court is asked to hold that it is also part of the bargain that the lenders must accept payment before the time

stipulated, although, in fact, they never in terms agreed to do so. The Legislature in 1871 evidently desired to extend the powers of guardians in the interests of the ratepayers, and this has been very effectually done, however the Act of 1871 is construed. But I can see nothing in the Act to prevent guardians after the Act from borrowing on such terms as they, in the interest of the ratepayers, think proper to agree to. The effect of the construction of the statute contended for by the guardians is to place upon them a fetter which must seriously affect their powers of borrowing. If that construction is right —if the statute incorporates as part of every contract of loan to guardians such a condition as they contend it does—it will follow that they can only borrow upon condition that they shall be at liberty to pay off the principal sum borrowed, whenever they can advantageously borrow money elsewhere to enable them to do so. Such a fetter would go far to prevent guardians from effecting loans on the most advantageous terms they could otherwise obtain at the time when they wanted money. I can find nothing in the Act to fetter guardians in this way. Looking at the matter from the lenders' point of view, I can find nothing in the Act which expressly, or by necessary inference, requires the Court to hold that, if guardians think proper to borrow money on the express terms of paying a fixed rate of interest, and of paying off the loan by instalments, they can nevertheless require the lenders to take back the unpaid principal at any moment, and without previous notice. If the Legislature really meant that all loans to guardians made after 1871 should be subject to such a condition, all I can say is that they have not said so, and I cannot myself infer, from the language used, a direction that, for the future, the borrowing powers conferred by the Act can only be exercised for the purpose of making such very one-sided bargains. In my opinion the decision of North J. is erroneous, and the appeal ought to be allowed.

A. L. SMITH L.J. I have the great misfortune of not being able to agree with my brothers Lindley and Rigby upon the construction of s. 2 of the Act of 1871. [After stating the facts

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and referring to the provisions of the Act of 1871 and prior Acts, his Lordship continued:—]

Now, pausing here (i.e., before the proviso to s. 2 of the Act of 1871), for whose benefit is this power to redeem given —with its necessary accompanying power to borrow money, if other money can, at any time during the continuance of the loan, be borrowed at a lower rate of interest than that secured by the charge? It seems to me obvious that it is in aid of the ratepayers, and of them alone. That the Legislature in 1871 knew of these loans for thirty years contracted prior to 1871, and of like loans about to be contracted subsequent to that date, is beyond dispute, and this section was passed to give relief to the ratepayers, in the event of the current rate of interest at any time falling below the contract rate during the thirty years the loan was running, if the guardians were able to borrow money to redeem the balance of the loan then unpaid, together with the contract interest, at a lower rate of interest than that contracted for. It is only in these two events that relief is given by the section. If the section had stopped here, which it does not, I should have been by no means satisfied that its true construction was that contended for on behalf of the appellants—namely, that a board of guardians could only take advantage of the provisions enabling them to redeem if they had a clause in their contract to that effect, or if, having no such clause, they could obtain the lenders' consent to redemption. What real benefit would it be to ratepayers to give them power to redeem and borrow money for that purpose, if they could not redeem without the consent of the lenders, for what lenders would consent to be redeemed, unless they were compelled to do so by contract or otherwise? Why should they, unless compelled, abandon a first-class continuing security, bearing a high rate of interest not obtainable elsewhere? This Act would be, if construed as the appellants suggest, of little, if any, value to the ratepayers. It is said that it gives the guardians power to borrow in order to redeem, but nothing more, and that redemption is only to take place in the event of the guardians having contracts compelling redemption, or of the lenders being willing to be redeemed. I can find no trace of the existence or con-

templation of any such contracts when the Act was passed, nor of their being in existence or contemplation now; and as to lenders voluntarily consenting to redemption, I have already dealt with that point. But it appears to me that any ambiguity as to the meaning of this section is removed, and its true construction made apparent, when its last few lines are read. [His Lordship read the proviso.] The Legislature thus clearly states what is to take place as regards loans made prior to the Act. These loans are not to be redeemed without the consent of the lenders, the reason for this being that existing contracts are not to be interfered with by subsequent legislation. But, as regards loans contracted after the passing of the Act, and with full knowledge of the Act, no such reason exists, and we therefore find in the Act no requirement as to consent having to be obtained to their redemption. It is said on behalf of the appellants that, if loans made after the passing of the Act may be compulsorily redeemed without any contract or consent in that behalf, a scandalous breach of contract is authorized by the Legislature, and that this could not have been its intention, and is, therefore, not the true construction of the section. This, however, begs the question, which is, What is the contract as regards loans to boards of guardians upon the security of the rates entered into after and with full knowledge of the Act of 1871? It must not be forgotten that the authority of guardians to enter into contracts and charge the rates thereby is the creation of statute. Every one who contracts with boards of guardians knows this to be so; and, in my judgment, there is nothing unreasonable in the Legislature enacting that, as regards contracts for loans, made after the coming into operation of the Act, upon the security of the rates, the guardians should be enabled to redeem the loans, if it so happens they can, during the continuance of the loan, borrow money at such a cheap rate as to enable them with advantage to do so; and, in my opinion, all contracts for loans made after the passing of the Act, though for a period of thirty years, are subject to what the Act of Parliament prescribes—namely, that they may in one event (i.e., if money can at any time during the contract period be obtained at a sufficiently low rate of interest) be

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redeemed, with the sanction of the Poor Law Board. Take this case. Suppose guardians after the passing of the Act of 1871 were by express contract to fix their ratepayers for thirty years to pay 5 per cent. upon the borrowed money, no matter whether it could afterwards during that period be obtained at, say, 2½ per cent.; would that be a valid contract? I think not, for the simple reason that after the Act of 1871 the guardians had no authority by statute so to contract and bind their ratepayers. Now the Legislature in this second section, as in the first, has been careful not to interfere with contracts made prior to the passing of the Act, except both parties to the contract agree, and it has accordingly expressly so stated; but this exception is pointedly omitted from the section as regards contracts made after the passing of the Act. To get rid of this undoubted fact the suggestion is made that the proviso in s. 2 was inserted ex abundanti cautelâ, to prevent its being said that the section was applicable to contracts made prior to the passing of the Act. But, if the meaning of s. 2 be, as argued for the appellants, that, whether the contract of loan be made before or after the passing of the Act, redemption can only take place with the stipulated or voluntary consent of the lender, I do not see the sense of inserting the proviso at all, for upon this hypothesis, whenever the contract be made, no redemption is to take place without the consent of the lender. Then, why insert a meaningless exception as to contracts made prior to the Act being passed? To my mind no intelligible answer has been given to this. Sir Robert Reid, for the appellants, sought to get over the difficulties in his way by the suggestion that the proviso was inserted to meet the case of a contract made prior to the passing of the Act, in which was contained an option of redemption, upon a six months' or other notice, and that, as before the Act (1871) it was most improbable that the guardians, although they had this option of redemption by contract, would ever exercise it, having ordinarily no means wherewith to do so, when the Legislature gave the power to borrow money, as it did in the Act of 1871, it did away with this improbability, and that it thereby altered the position of the lender for the worse, and so the proviso was

inserted that loans made prior to 1871 were not to be redeemed without the consent of the lender. To this I must answer that I am not aware that there ever were such contracts in cases of guardians borrowing upon the security of rates. The statutory forms of charge do not suggest them, and in the special case there is no such finding, and, what is more, the Act of 1871 does not purport to be dealing with any such supposed contracts, but, as will be seen by its recital, was dealing with contracts for loans which were to be repaid over a period of thirty years. But this suggestion of Sir Robert Reid only covered contracts made prior to the passing of the Act, and I asked him, what about those made subsequently thereto? He said that these contracts were not mentioned in the section because they were entered into by lenders who knew that, by the Act of 1871, power had been given to the guardians to borrow for the purpose of redemption, and therefore their position would not be altered as in the case of lenders prior to the Act. I do not dispute this last suggestion, for it seems strongly to support my view of the section. As they knew of the power to borrow, so they knew of the power to redeem. The object of the insertion of the proviso is to me plain and clear, if the section gives to the guardians a right of compulsory redemption, for it then limits that right to contracts made after the passing of the Act. If the section does not give this right, as is argued for the appellants, all I can say is that to my mind the proviso is senseless and without meaning. It was said that, if my construction of the section be correct, there should be found in it some provision as to what notice should be given to the lender prior to the loan being redeemed. But the guardians are not to redeem and borrow money for that purpose without an order of the Poor Law Board in that behalf, and it seems to me that the Legislature might well leave a matter like this to such an authority, even if the guardians desired to perpetrate injustice, which is not to be assumed, and indeed, in the present case, we find that a six months' notice has in fact been given. It is next said that s. 3 throws light upon s. 2. Well, what light does it throw? Before the Act of 1871 boards of guardians could only repay borrowed money by annual instalments.

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Sect. 3 now allows them to do so by half-yearly instalments, and it expressly enacts that, whenever they have contracted to repay by annual instalments, they may pay by half-yearly instalments, if the lenders consent. It is said—how ridiculous this is. If the Legislature has allowed loans to be redeemed without consent, if entered into after the passing of the Act, why not as to these also allow annual payments to become half-yearly payments without the consent of the lenders? I do not see for whose benefit the power of changing an annual payment into a half-yearly one is given. I should think it is more in favour of the lender than of the borrower, and so the Legislature has compelled no one to consent, and left it to the parties to agree. But I think s. 3, if it reflects any light at all upon s. 2, fortifies my view of the construction of that section. As in s. 1 so in s. 2, and also in s. 3, I find that the Legislature is careful to express that consent shall be obtained when it intends that it should be, and when it intends it should not be (as in s. 3 regarding contracts made after the passing of the Act) it advisedly omits saying anything about consent. I cannot think that s. 3 can be used in aid of the appellants' contention, for, in my judgment, it is against it. For these reasons I think the appeal should be dismissed; but, as my brothers think otherwise, it will be allowed with costs.

RIGBY L.J. From the time of the passing of the Poor Law Amendment Act, 1834, down to the present time, it has been the policy of the Legislature to enable boards of guardians and boards of management to borrow money on the security of rates, but that borrowing has always been subject to the consent of a Government Department: at first the Poor Law Board, and more recently the Local Government Board. As might have been expected, the conditions prescribed for the borrowing have been very strict, though they have varied from time to time.

In 1851 a statutory form of security was prescribed, which, with an alteration made in 1869 (substituting for the rates the common fund of the union, but immaterial for the present purpose), has ever since been, and still is, the prescribed form, and it was the form used in the cases now before the Court.

The material parts of that form are: (1.) the charge of the common fund of the union with the repayment of the loan by instalments of specified amounts for principal and interest at fixed dates; and (2.) a proviso that nothing in the security contained is to prevent the lenders from receiving the repayment of the whole or any part of the loan at any time before the day of payment of the last instalment, if willing so to do. From the nature of the security it follows that the instalments of the debt, so far as they are payable out of rates, can only be raised when, according to the contract, they become due—that is to say, rates cannot be levied in anticipation to pay instalments payable in future years. This is equivalent to saying that the guardians have no capacity by statute to pay off the debt, or to redeem the charge on the rates, except in strict accordance with the terms of their original contract. Regard, however, must be had to the proviso. As the lenders may be persons acting on their own account, or, if trustees for others, can derive no authority from the security which would aid them as against their cestuis que trust, it is plain that the meaning of the proviso must be (as the learned judge in the Court below has held) to relieve the lenders from the necessity of inquiring whether the borrowers have power to anticipate repayment or not. We are led, therefore, to the conclusion that the Legislature has all along had in its contemplation that there are, or may be, cases in which the borrowers have power to redeem independently of the statutory power, and has provided for, and so recognised, the legality of redemption in such cases with the lenders' consent. To go one step further, it seems plain that this consent may be given beforehand: for instance, in the contract of loan itself, or by a variation of the statutory form of security. What the cases are to which the proviso has reference it is not necessary to inquire. They cannot in all probability be cases of very frequent occurrence; but it is sufficient that the Legislature has thought it right in the common form of security to provide for redemption in anticipation of the times actually fixed. It is plain that, according to the statutory form, there could be no compulsory redemption by anticipation.

Where it is an object to obtain an investment that can be

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reckoned upon for a considerable number of years, as in the case of insurance companies, the stability of the investment will be an inducement to give better terms to the borrowers. At the same time, it is not unlikely that, among the vast number of borrowings under these Acts, there may be some in which the borrowers, having reason to suppose that they may be in a position to redeem otherwise than out of the rates, have stipulated for the right to do so. Such a right, however, would in its operation be greatly extended to the prejudice of the lenders by any legislative extension of the capacity of the borrowers to redeem.

Down to the passing of the Act of 1871, on the construction of which the present appeal turns, it seems clear that the only function of the Government Department charged with the supervision of these loans was to see that the borrowing was fit and proper from the point of view of the persons liable to repay. The Department had no jurisdiction whatever to interfere in the slightest degree with the rights of lenders, nor have they to this day any such jurisdiction, unless it be given them by s. 2 of the Act of 1871. For nearly a quarter of a century after the passing of that Act it does not appear to have occurred to any one that such a jurisdiction was conferred by the Act. It would obviously have been to the advantage of borrowers during the greater part of that period, whilst the current rate of interest has been falling, to invoke the exercise of it; but no attempt had been made to do so until the obtaining of the order of September 21, 1895, which is relied upon in this case. It appears from the special case that this order was only made as an experiment, and to allow the question to be raised. But it is now for the first time claimed on behalf of borrowers that s. 2 entitles them, whatever be the terms of the contracts they have made, to redeem loans contracted since the passing of the Act, whenever they can borrow on easier terms as to interest, and obtain the consent of the Department. It is, of course, part of the proposition that borrowers cannot contract themselves out of the benefit of the Act of 1871, or, in other words, that it is a hard and fast condition of all borrowing under the Act that borrowers may redeem under the Act, whenever it is advantageous to them to do so. If this were thoroughly under-

stood by lenders it would be taken into account by them, and would certainly embarrass borrowers, not improbably to the extent of making all future borrowing for long terms impossible in many conditions of the money market. If the Act of 1871 has by plain words of enactment, or by necessary implication, brought about such an extensive change in the position of borrowers under the Acts and lenders to them, the result, however unexpected, must be acquiesced in, and, if lenders since the passing of the Act have failed to realize the meaning of the statute, they have no legal ground of complaint. But, before the construction suggested is accepted, it must be shewn to rest upon a clear basis. In my judgment there is no such basis, and on the ordinary rules of construction the rights of lenders under the Act are in no way interfered with.

The operative words in s. 2 of the Act (independently of the proviso) seem to me altogether incapable of the meaning sought to be attributed to them. In terms they give only the capacity to borrow with a view to redemption (a most valuable extension of powers as regards the ratepayers), but they do not profess to give, and, in my judgment, as more fully appears below, are hardly capable of giving, anything more.

There are two, and only two, parts of the section which can be relied upon by the guardians as giving new rights, the rest of the section dealing only with the conditions subject to which the rights or powers, whatever they may be, are to be obtained and exercised. These are as follows: "(1.) They" (the guardians or managers) "may apply to the Poor Law Board for an order to enable them to redeem the balance of the loan, and to borrow so much money as may be necessary for that purpose. (2.) And if the said board shall issue their order in that behalf the said guardians or managers may borrow the requisite amount to redeem such balance." The first part quoted shews the object of the application; the second the result of an order made upon the application.

In clause 1, above quoted, the only right given is a right to apply. The purposes of the application are, however, carefully indicated—they are to enable the guardians to redeem and to borrow. The one word "enable" governs both "redeem" and

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"borrow." In itself it has the primary meaning, in the case of a person under any disability as to dealing with another, of removing that disability, not of conferring compulsory power as against that other. But in such an Act as the present, one of a series which has never dealt with compulsory powers, but has been exclusively concerned with conferring capacity, the presumption—already strong in favour of the primary meaning—becomes almost irresistible. When we add to this that, in order to use the word "enable" for the purpose required by the argument, it must have one meaning in connection with "redeem" and another in connection with "borrow," it may be said to be fairly demonstrated that the word cannot bear the meaning sought to be attributed to it.

But the case by no means ends there. Clause 2, above quoted, is inserted for the express purpose of explaining and defining the effect of an order made upon an application under clause 1, and it is confined strictly to removing disability or conferring capacity—the guardians and managers may borrow the requisite amount to redeem such balance. If it had been intended to confer a right of compulsory redemption, it seems almost impossible to explain why such an important right should not have been even glanced at when the effect of the order is being stated.

I am quite unable to say, as matter of construction, that a compulsory power of redemption is here coupled with a mere capacity to borrow; compulsory borrowing is, of course, out of the question. I think that capacity, and capacity only, is being dealt with here, as throughout the rest of the Acts.

But then comes the proviso, which has to bear the whole weight of the argument of the guardians.

Now, no doubt, a proviso may assist in determining which of two reasonable constructions of the clause upon which it is a proviso ought to be adopted; but it can hardly give to that clause an entirely different meaning from that which, standing alone, it would bear. At any rate, such a controlling force can only be attributed to a proviso when it can be demonstrated to be entirely meaningless on any other supposition. Is that the case with the proviso in this section? I think not. It provides only that, in the event (meaning, I suppose, in case) of

any loan outstanding at the time of the passing of the Act, no *such* redemption shall take place without the consent of the person to whom the loan shall be owing. I think that the word "such" is emphatic and important. It means plainly, a redemption under and by virtue of the preceding part of the section—that is, by money borrowed for the purpose. This seems to me to be the key to the meaning of the proviso. The section itself, on any construction of it, introduces an important power (the power of borrowing with a view to redeem), which had no existence before the passing of the Act. No real consent to a redemption in such circumstances could possibly have been given before the passing of the Act, for no one could foresee that such a change would arise.

I read the proviso, therefore, as necessarily referring to and requiring a consent after the passing of the Act. But, although no real consent to such a redemption could have been given before the passing of the Act, there might have been, and probably were (as hereinbefore shewn), consents to anticipatory redemption, which, though made with reference to totally different circumstances, would in terms apply to the new state of things introduced by the Act. To allow them to have such an operation would be manifestly unfair. The avoidance of this unfairness would be a reasonable, and is, I think, the true, explanation of the introduction of the proviso. Expanded by construction, it means, "notwithstanding any consent to redemption given before the Act, no redemption under the Act shall take effect without a consent given with reference to the new conditions."

Of course, this explanation would account for the fact that no reference is made in the proviso to loans incurred after the passing of the Act. All such loans would be contracted with the knowledge that the borrowers had, not indeed a compulsory, but a facultative power to redeem, and the parties would be left to make their own bargain as to redemption. If, as in the present case, the contracts and charges excluded the hypothesis of an anticipatory redemption by compulsion, that would be enough. If, on the contrary, there was an agreement to accept redemption by anticipation, there would be no reason why

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further consent should be given when the section became operative.

The result is that, in my judgment, the proviso is intended to place lenders before the Act, not in a better, but only in the same position as lenders after the Act.

Sect. 3 of the Act, which plainly applies to all loans, whether contracted before or after the passing of the Act, seems to me strongly to confirm the conclusion at which I have arrived as to s. 2. It indicates a continuing appreciation on the part of the Legislature of the strict manner in which the powers of redemption of borrowers under the Acts are limited, and the same abstinence from interference with the contractual rights of lenders which is manifest throughout these Acts, and, so far as I know, in this class of legislation generally.

To entitle the borrowers by one and the same act to pay off a loan compulsorily, it may be twenty or twenty-five years before the time fixed by contract for payment of the last instalment, and at the same time to make the right of paying by half-yearly, instead of annual, instalments dependent upon the consent of the lenders, would be such an instance of "straining at a gnat and swallowing a camel" as could hardly be reasonably attributed to the Legislature.

I have assumed that the Government Department under s. 2 of the Act have nothing to do with the interests of lenders, as, of course, is the case, if their authority only extends to increasing the capacity of borrowers.

On the other construction, the want of notice to the lenders would increase the arbitrary nature of the legislation, if indeed anything could be more arbitrary than an enactment authorizing borrowers, who have stipulated in terms for a loan to continue for thirty years, to pay off that loan whenever it is to their advantage to do so, without even the usual six months' notice, to which an ordinary mortgagee is by law entitled when the day for redemption has passed, or without any notice whatsoever.

Solicitors: *Travers Smith, Braithwaite & Robinson; Evans, Foster & Co.; Sharpe, Parker & Co., for Cleaver, Holden & Co., Liverpool.*

W. L. C.

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[1896 A. 525.]

Company—Memorandum and Articles—Alteration of Articles—Increase of Capital—Preference Shares.

A limited company, having no authority under its memorandum or articles of association to create any preference between different classes of shares, may by special resolution alter its articles so as to authorize the directors to issue preference shares by way of increase of capital.

Hutton v. *Scarborough Cliff Hotel Co.*, (1865) 2 Dr. & Sm. 521, overruled.

THIS was an appeal from a decision of Kekewich J.

The action was brought for the purpose of determining the rights inter se of the shareholders of the Gas Meter Company, Limited.

The company was formed and registered as a limited company under the Companies Act, 1856; but on October 24, 1862, it was registered under the Companies Act, 1862.

By the fifth clause of the company's memorandum of association it was stated that the nominal capital of the company was "60,000*l.* divided into 600 shares of 100*l.* each, every share being sub-divisible into fifths, with power to increase the capital as provided by the articles of association."

The original articles of association provided as follows:—

Art. 27: "The company may, with the sanction of the company previously given in general meeting, increase its capital."

Art. 28: "Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital."

Neither in the memorandum of association nor in the original articles of association was there any provision as to preference or priority of any class of shares.

In the year 1865 the company were desirous of purchasing a business of manufacturing meters from the administrator of

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one John West, and in view of such intended purchase a special resolution was passed that articles containing the following clauses should be added to the articles of association of the company:—

Art. 98: "The directors may issue by way of increase of capital 100 shares of 100*l.* each, fully paid up, bearing in manner hereinafter mentioned, from the 1st day of January, 1865, a preferential dividend of 5*l.* per share per annum, to be allotted to the administrator of John West, . . . in part payment of the consideration for the purchase of the premises, plant, stock-in-trade, &c., of the business of the said John West."

Art. 99: "The preferential dividend of 5*l.* per share on the said 100 shares. . . . shall be payable out of the profits of the company for the current year, so far as such profits will extend and no further, and no deficiency which may in any year happen in the amount of such dividend by reason of any failure or deficiency of profits shall be a charge on the profits or assets of the company in any subsequent year."

Art. 100: "The aforesaid 100 shares shall not entitle the holders thereof to any vote in the company, or to any participation in bonus, or to any dividend beyond 5*l.* per share per annum, limited as aforesaid."

Art. 101: ". . . . The aforesaid 100 shares shall be considered and treated as no part of the paid-up share capital for the purpose of apportioning bonus."

In accordance with these articles the company issued, or purported to issue, 100 preference shares to the administrator of John West.

In the year 1880 resolutions were passed under which each of the shares in the company was sub-divided into ten shares.

The existing capital of the company was 69,800*l.*, consisting of 5980 ordinary shares of 10*l.* each and 1000 preference shares of 10*l.* each. All the preference shares were issued as fully paid up. All the existing ordinary shares were fully paid up.

The company had paid dividends of 5 per cent. per annum on the preference shares from their issue in 1865, and dividends on the ordinary shares varying between 6 and 17½ per cent.

More than 35,000*l.* had been earned by the company, and

was in fact revenue, but had been applied to capital purposes. It was contemplated to re-transfer such moneys to revenue account and distribute them among the members, and at the same time to offer to the members an equivalent amount in shares of the company at par. In consequence of such intention the question had arisen whether the preference shares issued by the company had been properly issued, and whether the holders of preference shares were entitled to any and, if any, what interest in the amount so earned; and this action was accordingly brought on April 22, 1896, by the plaintiff, who was the holder of thirty ordinary shares which he had held since September 25, 1890, against the defendant H. Finlay, who was the holder of 160 preference shares which he had held since November 16, 1882, and the company, claiming on behalf of the plaintiff and the other ordinary shareholders: (1.) A declaration that all profits of the defendant company, after providing for a preferential dividend of 5*l.* per cent. on the preference shares issued by the company, belonged to and ought to be equally divided between the ordinary shareholders of the company; or in the alternative, (2.) to have it determined how and in what proportion the profits of the company (after providing for a preferential dividend of 5*l.* per cent. on the preference shares issued by the company) ought to be divided between the holders of ordinary shares and of preference shares in the company.

The defendant Finlay was appointed by the Court to represent all the preference shareholders.

In consequence of the ordinary shares being more valuable than the preference shares, it was contended on behalf of the ordinary shareholders, first, that the preference shares were validly issued; and, secondly, that, assuming they were not, the preference shareholders were not entitled to the rights of ordinary shareholders, but that the resolution and articles relating to the preference shares ought to be read as though the word "preference" had been struck out, the effect of which would be that the holders would not be entitled to receive a dividend of more than 5 per cent. On behalf of the preference shareholders, it was contended that the company had no power

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to create a preference between different classes of shares, and that consequently the preference shareholders were entitled to rank as ordinary shareholders.

Kekewich J. decided, first, that he was bound by *Hutton* v. *Scarborough Cliff Hotel Co.* (1) to hold that the company had no power to issue preference shares; secondly, that the holders of such shares were not entitled to the rights of ordinary shareholders, and were not members of the company, and that their only remedy was restitution of the money which they had contributed to the company.

The defendant Finlay appealed.

Warrington, Q.C. (*Kirby* with him), for the appellant. The learned judge having held that the issue of preference shares was invalid, and that the holders of such shares were not entitled to rank as ordinary shareholders, it is now contended, first, that the preference was validly created; and, secondly, that, if not, the holders are in the same position as ordinary shareholders.

Upon the first point, Kekewich J. considered himself bound by the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (1) There the memorandum contained no reference to the articles, and the articles contained no power to create shares with special privileges. In the first case (2) Kindersley V.-C. decided that the company had no power without altering its articles to issue the unallotted portion of the original capital with a preferential dividend, and that decision was affirmed on appeal. (3) In the second case the Vice-Chancellor held that the company could not alter its articles so as to enable it to issue new shares with a preferential dividend, on the ground that such alteration was an alteration in the constitution of the company, and from that decision there was no appeal.

In *Harrison* v. *Mexican Ry. Co.* (4) Sir G. Jessel, while considering himself bound by *Hutton* v. *Scarborough Cliff Hotel Co.* (1), held that though it might be inferred from the memorandum of association, where it was silent on the subject of the

(1) 2 Dr. & Sm. 521.
(2) (1865) 2 Dr. & Sm. 514.
(3) (1865) 4 D. J. & S. 672.
(4) (1875) L. R. 19 Eq. 358.

terms of the original contract under which the company was formed, that all shareholders were to rank equally as regards dividend, that inference was capable of being rebutted by a clear provision in the articles if contemporaneous with the memorandum. That was followed by *In re South Durham Brewery Co.* (1) and *In re Bridgewater Navigation Co.* (2) In *Guinness* v. *Land Corporation of Ireland* (3) Cotton L.J. expressed the opinion, first, that where the memorandum of association contained conditions not required by the Act of 1862, it was to that extent capable of alteration; and, secondly, that the equality of the shareholders did not arise by implication from the construction of the memorandum, but from the law of partnership.

Finally, in *British and American Trustee and Finance Corporation* v. *Couper* (4), Lord Macnaghten said that the second decision of Kindersley V.-C. in *Hutton* v. *Scarborough Cliff Hotel Co.* (5) was not founded upon a sound view of the Act of 1862, and deliberately dissented from it.

It is submitted, first, that the reference to the articles in clause 5 of the memorandum, which empowers the company to increase its capital as provided by the articles, means the articles in force for the time being when the increase is contemplated; for the person who framed the memorandum must be taken to have known that under s. 50 of the Act of 1862 the articles were capable of modification by special resolution. Consequently the articles as altered must be read as explaining the memorandum and rebutting the presumption, if any, arising therefrom, as to the equality of the shareholders. For this proposition it is not necessary to overrule the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (5), as explained by subsequent authorities. But further, it is submitted that that decision is wrong, and ought to be overruled, and that, even without the reference to the articles in the memorandum, the company could give itself power to issue these preference shares by a special resolution altering the articles. The essential

(1) (1885) 31 Ch. D. 261.
(2) (1888) 39 Ch. D. 1.
(3) (1882) 22 Ch. D. 349, 377.
(4) [1894] A. C. 399, 417.
(5) 2 Dr. & Sm. 521.

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conditions of the memorandum are stated in s. 8 of the Act of 1862, and one of those conditions is the amount of capital. But by s. 12 the company is expressly empowered to modify the conditions of the memorandum so as to increase its capital, if authorized to do so by the articles as originally framed or as altered by special resolution. Therefore, the clause in the memorandum as to the increase of capital is mere surplusage, and cannot in any view of the case be treated as importing equality between the shareholders in respect of that capital.

[Their Lordships intimated that they desired to hear counsel for the respondent on the question as to the validity of the issue of preference shares before dealing with the question as to the position of the preference shareholders, in the event of the issue being declared to be invalid.]

P. O. Lawrence, Q.C., and *Eustace Smith*, for the respondent. Upon the true construction of clause 5 of the memorandum, the reference to the articles is a reference to the articles as they then stood, and the intention was to incorporate art. 28. If any increase was to be permitted, it was to be on the same footing as the original capital, i.e., on the footing of equality. *Hutton* v. *Scarborough Cliff Hotel Co.* (1) is expressly recognised as an authority in *Ashbury* v. *Watson* (2), which shews that a memorandum may contain conditions beyond those required by the statute, which are nevertheless unalterable.

The decision of the Vice-Chancellor has also been recognised in the text-books: Lindley on Companies, 5th ed. pp. 322, 334, 343, 396, 405, 597; Buckley on Companies, 6th ed. p. 182.

Warrington, Q.C., in reply.

[The question as to the position of the holders of preference shares in the event of the issue being declared to be invalid was then argued.]

Cur. adv. vult.

Feb. 6. LINDLEY L.J. delivered the judgment of the Court (Lindley, A. L. Smith, and Rigby L.JJ.) as follows:—The

(1) 2 Dr. & Sm. 521. (2) (1885) 30 Ch. D. 376.

question raised by this appeal is whether certain preference shares issued by a limited company as long ago as 1865 were validly issued or not. If they were not, a further question will arise, which is—what are the rights of their present holders? The company was formed and registered as a limited company under the Companies Act, 1856; but in October, 1862, it was registered under the Companies Act, 1862, and it is by that Act and the decisions upon it that the above questions have to be determined. The company's original capital as stated in its memorandum of association was "60,000*l.*, divided into 600 shares of 100*l.* each, every share being sub-divisible into fifths, with power to increase the capital as provided by the articles of association." By the articles of association which accompanied the memorandum of association, and were registered with it, power was given to the company to increase the capital (art. 27), and it was provided that any new capital should be considered as part of the original capital (art. 28). The issue of preference shares was not contemplated or authorized. In 1865 the company desired to acquire additional works, and passed a special resolution under the powers conferred by the Companies Act, 1862, ss. 50 and 51, altering the articles and authorizing the issue of 100 shares of 100*l.* each, fully paid, and bearing a preferential dividend of 5*l.* per cent. per annum. Those shares were accordingly issued to the vendors of the works referred to, and are the shares the validity of which is now in question. The company has been prosperous, and the ordinary shareholders have for years received a higher dividend than the preference shareholders. A considerable reserve has also been accumulated, and this action has been brought to determine the rights of the preference shareholders to this reserve fund. The learned judge has held that the creation of the preference shares was ultra vires, and that their holders never became and are not now shareholders in the company, and that they have none of the rights of shareholders, whether preference or ordinary. He has not, however, declared more definitely what their rights are. They have appealed from this decision; but on the appeal they only claimed to be preference shareholders entitled to a preferential dividend of

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5 per cent. Their claim to any share of the reserve fund was dropped. The judgment against the validity of the preference shares is based upon the well-known case of *Hutton* v. *Scarborough Cliff Hotel Co.* (1), which came twice before Kindersley V.-C. in 1865, and which Kekewich J. very naturally held to be binding on him. Kindersley V.-C.'s first decision was that a limited company which had not issued the whole of its original capital could not issue the unallotted shares as preference shares unless authorized so to do by its memorandum of association or by its articles of association. This decision was affirmed on appeal (2), and was obviously correct; and would have been correct even if the whole of the original capital had been issued and the preference shares had been new and additional capital. The company, however, afterwards passed a special resolution altering the articles and authorizing an issue of preference shares. This raised an entirely different question, and led to the second decision. (3) The Vice-Chancellor granted an injunction restraining the issue of the preference shares, and he held distinctly that the resolution altering the articles was ultra vires. He did so upon the ground, as we understand his judgment, that there was in the memorandum of association a condition that all the shareholders should stand on an equal footing as to the receipt of dividends, and that this condition was one which could not be got rid of by a special resolution altering the articles of association under the powers conferred by ss. 50 and 51 of the Act. The judgment of the Vice-Chancellor is a little obscure, because he treats the condition as a condition of the constitution of the company, and he may have meant by that expression either the constitution as fixed by the memorandum of association or the constitution as fixed by the memorandum of association and the original articles. But unless he had meant the constitution of the company as fixed by the memorandum of association his decision is unintelligible; for, so far as the constitution depended on the articles, it clearly could be altered by special resolution under the powers conferred by ss. 50 and 51 of the

(1) 2 Dr. & Sm. 514, 521. (2) 4 D. J. & S. 672.
(3) 2 Dr. & Sm. 521.

Act. A company cannot deprive itself of this power: see *Mallinson* v. *National Insurance and Guarantee Corporation* (1) and *Walker* v. *London Tramways Co.* (2) The Vice-Chancellor further seems to have been of opinion that the condition could be excluded by contemporaneous articles of association, and his decision has been so understood by succeeding judges. Accordingly, in 1875, in the case of *Harrison* v. *Mexican Ry. Co.* (3), Sir G. Jessel held that the condition of equality imported into the memorandum of association by Kindersley V.-C.'s decision was negatived by one of the articles of association filed with the memorandum, and which article authorized the creation of additional capital by the issue of new shares, "in such manner, to such amount, and with and subject to such rules, regulations, privileges, and conditions" as the company should think fit. In our opinion it is impossible to uphold this decision, or the view of Kindersley V.-C. himself, as to the effect of articles on the memorandum, if it is once conceded that it is a condition in the memorandum of association that there shall be equality amongst the shareholders. If the condition is really one of the conditions of the memorandum, it is immaterial whether the condition is express or implied. If the memorandum of association really prescribed equality amongst all the shareholders, as Kindersley V.-C. held that it did, the articles of association could not override the memorandum of association in that particular. (See s. 12 of the Act, and *Ashbury Railway Carriage and Iron Co.* v. *Riche* (4) and *Guinness* v. *Land Corporation of Ireland.* (5)) The departure thus made by Sir G. Jessel from the principle on which the Vice-Chancellor based the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (6) was sanctioned by the Court of Appeal in 1885 in the case of *In re South Durham Brewery Co.* (7), and again in 1888 in *In re Bridgewater Navigation Co.* (8), a case which, although reversed on another point (9), was not questioned on the point now under consideration. These decisions turned upon the

(1) [1894] 1 Ch. 200.
(2) (1879) 12 Ch. D. 705.
(3) L. R. 19 Eq. 358.
(4) (1875) L. R. 7 H. L. 653, 667.
(5) 22 Ch. D. 349.
(6) 2 Dr. & Sm. 521.
(7) 31 Ch. D. 261.
(8) 39 Ch. D. 1.
(9) (1889) 14 App. Cas. 525.

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principle that although by s. 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum, as in *Ashbury* v. *Watson* (1)) may be determined by the company from time to time by special resolution pursuant to s. 50 of the Act. This view, however, clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shews the contrary. That proposition is, in our opinion, unsound. Its unsoundness was distinctly pointed out by Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*. (2) The view taken by Kindersley V.-C. cannot, in our opinion, be supported by reference to the Companies Act of 1862; and it is inconsistent with the decisions to which we have referred, and which, if wrong, can only now be set right by the House of Lords.

It was, however, contended that this Court, at all events, had approved and followed the decision of Kindersley V.-C.; and *Ashbury* v. *Watson* (1) was referred to on this point. In that case the memorandum of association stated that preferential shares might be created, and what the preferential rights were to be; and it was held that these were conditions which could be properly introduced into the memorandum of association, and which, being introduced there, could not be afterwards departed from and be treated as articles of association capable of change. No doubt Fry L.J. relied on *Hutton* v. *Scarborough Cliff Hotel Co.* (3) to shew that provisions about preference shares were conditions which could properly be inserted in the memorandum of association; but the propriety of the decision of Kindersley V.-C. in that case was not before the Court, and we do not regard *Ashbury* v. *Watson* (1) as conflicting with

(1) 30 Ch. D. 376. (2) [1894] A. C. 416, 417.
(3) 2 Dr. & Sm. 521.

any of the other decisions of the Court of Appeal, in which Kindersley V.-C.'s decision has been judicially considered.

We desire to add that we do not base our judgment in this case on the words "with power to increase the capital as provided by the articles of association," which are in the memorandum of association. That power would have existed under s. 12 of the Act if those words had not been in the memorandum. We prefer to rest our decision on the grounds above explained. But the words in the memorandum to which we are now referring certainly shew that the conditions on which new capital was to be issued were not to be implied from the memorandum of association, but were to be ascertained from the articles; and as these might be changed from time to time under the powers conferred by ss. 50 and 51 of the Companies Act, 1862, it would follow from *Harrison* v. *Mexican Ry. Co.* (1), and other cases like it, that the resolutions of 1865 would be valid, even if the second decision could still be regarded as good law.

For the reasons, however, which we have given we are of opinion that the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (2) was wrong, and ought not to be followed, and that the decision appealed from must be reversed, and the resolutions thereby declared to be ultra vires must be declared intra vires and valid. If, by declining to follow the second decision in *Hutton* v. *Scarborough Cliff Hotel Co* (2), we were disturbing titles or embarrassing trade or commerce we should treat it as one of those decisions which, though wrong, it would be mischievous to overrule. But such is not the case; and it is desirable, from all points of view, to remove from companies a fetter which ought never to have been imposed upon them, and which in practice has been got rid of by skilled draftsmen by the insertion of power to issue preference shares in the original articles of association or the memorandum of association itself. These devices will no longer be necessary. We understand that there will be no dispute now as to the rights of the preference shareholders, and that the proper declaration will be

(1) L. R. 19 Eq. 358. (2) 2 Dr. & Sm. 521.

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as asked by the plaintiffs in the first paragraph of their claim. The costs will be provided for by the parties.

RIGBY L.J. There is one remark I want to make with reference to the supposed influence of the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (1) during all this series of years. According to my recollection, from the very first it was looked upon as a doubtful decision, and I doubt if any one deliberately acted upon it. But when there came the decision of *Harrison* v. *Mexican Ry. Co.* (2) before the late Master of the Rolls in 1875, I think it was considered extremely difficult, if not impossible, to reconcile that in any way with *Hutton* v. *Scarborough Cliff Hotel Co.* (1) The Master of the Rolls certainly does not profess to overrule the principle of that decision, but he decides upon a principle which would be equally applicable in the case before Kindersley V.-C., for in that case, in the existing articles of association, a contemporaneous document with the memorandum that the Vice-Chancellor was considering, were two articles, 17 and 18—one authorizing an increase of capital, and the other saying that "the increased capital shall be raised from time to time in the number of shares, and of the amount or value and, subject to these articles, on such conditions as the extraordinary general meeting shall direct." I cannot treat the case of *Hutton* v. *Scarborough Cliff Hotel Co.* (1) from the date of *Harrison* v. *Mexican Ry. Co.* (2) as being an unchallenged decision. I think it was virtually overruled from that date.

Solicitors for all parties: *Blyth, Dutton, Hartley & Blyth.*

(1) 2 Dr. & Sm. 521. (2) L. R. 19 Eq. 358.

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C. A.
1896
STIRLING J
Oct. 30, 31:
Nov. 17, 18, 28.
C. A.
1897
Jan. 11, 12, 30

[1896 R. 1583.]

Mining Lease—Power to Distrain for Rent in arrear—Chattels of Lessee on adjoining Mine—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 6—*Registration of Lease—Company—Voluntary Winding-up—Distress—Receiver—Rights of Debenture-holders' Receiver.*

A mining company (now in liquidation) were lessees, from separate lessors, at certain rents and royalties, of two adjoining coal-mines A and B. There was no shaft on mine B, and the company worked both mines by means of a shaft on mine A. In each of the leases the lessor reserved to himself express power to distrain for rent in arrear, not only upon chattels belonging to the lessees on the demised premises, but also upon chattels belonging to the lessees in or about "any adjoining or neighbouring collieries." In October, 1896, the lessors of mine B levied a distress upon chattels belonging to the lessees on mine A:—

Held (reversing the decision of Stirling J.), (1.) that, having regard to the nature of the demise and the manner in which the minerals were worked, the power to distrain upon chattels belonging to the lessees upon adjoining or neighbouring mines did not constitute the mining lease a bill of sale within the meaning of the Bills of Sale Act, 1878, so as to require registration under the Bills of Sale Acts; and *Held* also (2.) that the distress, having been levied before the commencement of the winding-up of the company, and before a receiver was effectively appointed on behalf of the debenture-holders of the company, was valid against the debenture-holders.

Per the Court of Appeal: This last decision is in accordance with *Biggerstaff* v. *Rowatt's Wharf Co.*, [1896] 2 Ch. 93, and not inconsistent with *In re Opera, Limited*, [1891] 3 Ch. 260.

Per Stirling J.: The Court will not at the instance of the liquidator restrain further proceedings under a distress levied by the landlord of a limited company before the commencement of the winding-up, but not completed by sale, unless there are special reasons rendering it inequitable to allow the distress to go on; but *semble*, the Court has jurisdiction under the Companies Act, 1862, both in a compulsory and a voluntary winding-up, to restrain by injunction further proceedings under such distress.

The fact that a distress has been levied between the passing and confirmation of a special resolution for a voluntary winding-up is not a ground for such injunction.

The doctrine of *Tennent* v. *City of Glasgow Bank*, (1879) 4 App. Cas. 615, does not apply to a contest between different classes of creditors.

Pulbrook v. *Ashby*, (1887) 56 L. J. (Q.B.) 376, explained and approved by the Court of Appeal.

The Roundwood Colliery Company, Limited, was formed in 1889. They carried on business at Roundwood, near Rotherham,

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in the county of York, and issued debentures which were in form a charge of the moneys and interest secured upon all the undertaking of the company and its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. The debentures were all to rank pari passu as a first charge upon the undertaking of the company, and such charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge on its freehold and leasehold land in priority to the debentures.

The Earl of Effingham and Mr. Foljambe were respectively owners of certain coal mines lying adjacent to each other at or near Roundwood, and the only existing shaft whereby the coals could be brought to bank was situated on the lands of Mr. Foljambe.

On November 10, 1890, the company became assignees of a lease dated November 7, 1890, whereby Mr. Foljambe demised certain pits, shafts, offices, buildings, lands, and seams of coal forming part of the above-mentioned coal property and including the existing shaft, with liberty to work and get the seams of coal, and to use the works aforesaid, for thirty years, at certain rents and royalties, and with a power of distress similar to that in the lease next mentioned.

By a lease dated November 20, 1891, Lord Effingham demised to the company a seam of coal (but no surface land) adjoining the mines and seams of coal demised by the indenture of November 7, 1890, with liberty to work and get the same, for thirty years from July 1, 1891, at the half-yearly rent of 30*l.* for every acre in extent being one foot in thickness, and so in proportion for any greater or less extent than an acre, and for every greater or less thickness than one foot gotten during the previous half-year, so that a minimum rent of 45*l.* half-yearly should be paid during the first year, and increasing minimum rents during the second and succeeding years of the term.

The lease contained the covenants usually found in mining leases, including a covenant on the part of the lessees to pay the rents reserved, and also contained a power of distress in the following terms: "Provided always and it is hereby declared

that if and whenever any of the rents hereinbefore reserved or any part thereof shall be in arrear for twenty-one days, whether the same shall have been legally demanded or not, the lessor, his heirs, or assigns may enter and seize, distrain, sell, and dispose of in the same manner as landlords may for rent in arrear any engines, machinery, implements, tools, chattels, or effects then belonging to the lessees or their assigns in or about any of the premises hereby demised or any adjoining or neighbouring collieries, and out of the moneys arising from the sale of any distress or distresses so levied may satisfy and pay or retain all arrears of rent and the expenses incident to any such proceedings, rendering the overplus (if any) unto the lessees or their assigns."

In due course of working, the coal won by the company from Lord Effingham's seams was taken by them through the workings on Mr. Foljambe's lands, and was brought to bank up the shaft constructed thereon, the coal from the two properties being thus worked together.

Under both leases rent was in arrear in September, 1896.

On September 24, 1896, a general meeting of the company was held, at which a special resolution was passed that the company should be wound up voluntarily.

The company having made default within the conditions of the debentures, a debenture-holders' action was commenced against them on October 1, 1896.

On October 7, 1896, an order was made in the action appointing a Mr. William Wing receiver, subject to his giving security. This order, however, was not drawn up, and never became effective, and there was no proof that the lessors had any notice of it.

On October 12 two distresses were put in, one by Mr. Foljambe, the other by Lord Effingham, and under the distress levied by Lord Effingham certain goods and chattels belonging to the company were seized which were not upon the property demised by his lease, but upon the adjoining colliery demised by Mr. Foljambe.

On October 13, 1896, the resolution passed on September 24 was duly confirmed, and Mr. William Wing was appointed

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liquidator, so that the winding-up of the company commenced on that day.

On October 14, 1896, the usual judgment was given in the debenture-holders' action, and Mr. William Wing was appointed receiver and manager of the assets and business on behalf of the debenture-holders, with power to act at once notwithstanding the order not being drawn up or security given; and he proceeded to take possession of the property of the company.

On October 30, 1896, two motions were made before Stirling J., one by Mr. Wing, as liquidator of the company, in order to restrain the further proceeding with the two distresses levied by Mr. Foljambe and Lord Effingham; and the other by the plaintiff in the debenture-holders' action seeking similar relief against Lord Effingham only.

Buckley, Q.C., and *Eustace Smith*, for the liquidator. In the case of a compulsory winding-up the Court will interfere with an execution put in after the presentation of the petition. The same principle applies in the case of a voluntary liquidation; and where, as here, a distress has been put in after the passing of a resolution to wind up the company, the Court will not allow it to go on.

Sects. 85 and 87 of the Companies Act, 1862, deal with the power of the Court to restrain proceedings against a company both in the interval between the presentation of a petition and an order upon it, and also after the making of an order. Those sections do not, however, in terms apply to voluntary liquidations.

Under s. 138 the liquidator may apply to the Court to exercise all the powers which it might exercise in the case of a compulsory winding-up; and we submit that s. 163, by which executions or distresses put in force against a company after the commencement of the winding-up are avoided, also applies in a voluntary winding-up: *Thomas* v. *Patent Lionite Co.* (1) The question is what is the law where a distress has been put in between the passing and confirmation of resolutions for a

(1) (1881) 17 Ch. D. 250.

voluntary winding-up, and we ask your Lordship to apply the principle laid down in *Tennent* v. *City of Glasgow Bank*. (1)

Further, the peculiar power of distress in Lord Effingham's lease is a licence to take possession of personal chattels as a security for a debt within s. 4 of the Bills of Sale Act, 1878, and requires registration as a bill of sale: *Pulbrook* v. *Ashby*. (2)

The exception as to mining leases in s. 6 applies only where the power of distress is confined to things found on the demised premises, and could never have been intended to enable a landlord to distrain upon property not included in the lease. See as to the construction of these two sections, Key and Elphinstone's Conveyancing Precedents, 4th ed. vol. i. p. 901.

Younger, for the debenture-holders, adopted the foregoing arguments.

Hastings, *Q.C.*, and *Upjohn*, for the landlords. Where a landlord levies a distress before the commencement of a winding-up the Court has no jurisdiction to interfere with him. The only section in the Companies Act which deals with the effect of a winding-up upon a distress is s. 163; but that section is confined to distresses put in force, which means actually levied—*In re London and Devon Biscuit Co.* (3)—after the commencement of the winding-up.

Sect. 85 does not apply, because a distress is not a proceeding within that section. The word "proceeding" must be read in connection with the words which accompany it, and means something ejusdem generis with "action" or "suit." Here the action was concluded at the date of the winding-up; and, that being so, the Court has no power to restrain a man from reaping the fruits of his action: *In re Great Ship Co.* (4): per Knight Bruce L.J.

[Stirling J. referred to *In re Exhall Coal Mining Co.* (5)]

[*Buckley*, *Q.C.*, referred to *Westbury* v. *Twigg* (6) and *In re Thurso New Gas Co.* (7)]

(1) 4 App. Cas. 615.
(2) 56 L. J. (Q.B.) 376.
(3) (1871) L. R. 12 Eq. 190.
(4) (1863) 4 D. J. & S. 63.
(5) (1864) 4 D. J. & S. 377.
(6) [1892] 1 Q. B. 77.
(7) (1889) 42 Ch. D. 486.

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Assuming the jurisdiction to exist, there is here no ground for the interference of the Court: *In re Great Ship Co.* (1); *Ex parte McLaren* (2); *Ex parte Hawkins* (3); *In re Withernsea Brickworks* (4); *In re London Cotton Co.* (5)

Reliance has been placed on *Tennent* v. *City of Glasgow Bank* (6), where it was held that a claim to avoid a voidable contract was subject to this, that the rights of innocent parties acquired on the faith of the contract ought not to be prejudiced. That case depended upon the general law, and there was not there any fixed period for the avoidance of the contract; it has no application to the present case, which turns upon the construction of the Companies Act, 1862. Here the test is whether the distress has or has not been levied before the winding-up. It is true that a voluntary liquidation does not of itself operate as a stay of all proceedings; but it enables the liquidator under s. 138 to apply to the Court for a stay under s. 85, and the Court will be guided by the principles applicable to a compulsory winding-up; and where a landlord has actually levied a distress before the commencement of the winding-up, which, in the case of a voluntary winding-up, is the date of the confirmatory resolution, the Court will not restrain him from proceeding to sale in the exercise of his ordinary legal rights.

Then, as to the question under the Bills of Sale Act, 1878. There is no authority for the proposition that a power of distress to recover rent falls under the Act. It is not a security for a debt or advance within s. 4, nor does it fall within s. 6, because mining leases are expressly excepted therefrom.

Buckley, Q.C., in reply. I admit that as a general rule, where a distress has been levied before the commencement of the winding-up, the Court will not interfere with the landlord's rights; but I rely upon the fact that the landlords have waited until the day before the confirmatory resolution before putting in their distresses, and I say that at that date the rights of the general body of creditors had intervened. If these landlords are allowed to proceed to sale it will defeat the main object of the Legislature,

(1) 4 D. J. & S. 63.
(2) (1881) 16 Ch. D. 534.
(3) (1868) L. R. 3 Ch. 787, 790.
(4) (1880) 16 Ch. D. 337.
(5) (1866) L. R. 2 Eq. 53.
(6) 4 App. Cas. 615.

which was to provide for the administration of the assets of the company pari passu among all the creditors at the time of the winding-up without giving preference to any particular creditor: *In re Brown, Bayley and Dixon* (1); *In re South Kensington Co-operative Stores* (2); *In re Silkstone and Dodworth Coal and Iron Co.* (3); *In re General Rolling Stock Co.* (4) The fact that this is a voluntary winding-up does not affect the power of the Court to order a stay of proceedings: *Walker* v. *Banagher Distillery Co.* (5)

That a distress is a proceeding within ss. 85, 87 is shewn by *In re Lancashire Cotton Spinning Co.* (6), where *In re Exhall Coal Mining Co.* (7) was followed; and if a distress is a proceeding, a sale under a distress is a proceeding in that proceeding within those sections: *In re Perkins Beach Lead Mining Co.* (8); *In re Artistic Colour Printing Co.* (9)

Cur. adv. vult.

1896. Nov. 28. Stirling J., after stating the facts, continued as follows:—The present motions are based on two grounds, one of which applies to both distresses, the other only to the distress put in by Lord Effingham. The first point, which applies to both distresses, is that the Court ought to restrain both under the jurisdiction which it is said is conferred by the Companies Act, 1862. That Act contains no provisions as to distress expressly applicable where the winding-up is purely voluntary, but s. 138 enables the liquidator in a voluntary winding-up to apply to the Court to exercise in respect of any matter all or any of the powers which the Court might exercise if the company were being wound up compulsorily. It is asserted on the one hand and denied on the other that, in the case of a compulsory winding-up, the Court has power to restrain further proceedings under a distress levied or execution issued at the commencement of the winding-up, but not completed by sale. Unquestionably, in one of the earliest cases on the subject—*In re Great Ship*

(1) (1881) 18 Ch. D. 649.
(2) (1881) 17 Ch. D. 161.
(3) Ibid. 158.
(4) (1872) L. R. 7 Ch. 646.
(5) (1875) 1 Q. B. D. 129.
(6) (1887) 35 Ch. D. 656.
(7) 4 D. J. & S. 377.
(8) (1877) 7 Ch. D. 371.
(9) (1880) 14 Ch. D. 502.

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Co. (1)—great doubt as to the existence of the jurisdiction was expressed by one at least of the learned judges who then constituted the Court of Appeal. It is said on behalf of the landlords that it has never yet been decided that the jurisdiction exists; while on behalf of the applicants the contention is that, although there may be no express authority on the point, the course of subsequent decisions, as shewn by such cases as *In re Exhall Coal Mining Co.* (2), *In re Perkins Beach Lead Mining Co.* (3), *In re Artistic Colour Printing Co.* (4), *In re South Kensington Co-operative Stores* (5), *In re Lancashire Cotton Spinning Co.* (6), and others, proves that the doubts expressed as to the jurisdiction in *In re Great Ship Co.* (1) had been removed. These last-mentioned cases appear to me, as at present advised, to bear out the contention of the applicants. I do not, however, express a final opinion on the matter, because I have come to the same conclusion as the learned judges who decided *In re Great Ship Co.* (1): that the jurisdiction, if it exists ought not to be exercised in the present case. The reasons for that conclusion in the case to which I have referred are shortly stated by Turner L.J. (7) He there says: "The true question therefore is, what circumstances ought to influence or guide the Court in the exercise of that discretion. In my judgment the Court, in dealing with a question thus dependent on its discretion, is bound to look at the legal rights of the parties, and at the interests not of one class of creditors only, but of each particular class of creditors who may be affected by the decision at which it shall arrive. I think, with all deference to the Master of the Rolls, that there is nothing in this Act of Parliament which gives to the general creditors of this company any right to have their interests consulted in preference to the interests of the particular creditor whose case may come before the Court. I think it is the duty of the Court to hold an even hand between the interests of all the parties, and I take this section to have

(1) 4 D. J. & S. 63.
(2) Ibid. 377.
(3) 7 Ch. D. 371.
(4) 14 Ch. D. 502.
(5) 17 Ch. D. 161.
(6) 35 Ch. D. 656.
(7) 4 D. J. & S. 69.

been introduced into the Act of Parliament very much with a view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company." The result, as I understand it, is this: that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding-up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so. On the other hand, the case of *In re Lancashire Cotton Spinning Co.* (1) shews that a creditor who does not issue execution or a landlord who does not levy a distress until after the commencement of the winding-up will not be allowed to proceed unless there are special reasons which render such a course inequitable.

In applying these rules to the case of a voluntary winding-up the first inquiry must be, What is the commencement of a voluntary winding-up? That was long ago settled to be the time of the passing of the second or confirmatory resolution, where the winding-up is resolved upon by special resolution: *Weston's Case.* (2) It follows that in the present case these distresses had been put in force at the commencement of the winding-up, and consequently the discretion of the Court is to be exercised according to the rules laid down in *In re Great Ship Co.* (3) The distresses, therefore, ought to be allowed to proceed unless there are special reasons which render it inequitable that they should be permitted so to do. [His Lordship then reviewed the evidence, and came to the conclusion that there were no special grounds which would render it inequitable to permit the landlords to proceed, and he continued as follows:—]

It was further contended that the rights of the general creditors had intervened at the date when the distresses were levied, and consequently that they ought not to be allowed to proceed, and reliance was placed on the analogy afforded by the case of *Tennent* v. *City of Glasgow Bank* (4), where it was held that after a bank had stopped payment, and its insolvency had

(1) 35 Ch. D. 656.
(2) (1868) L. R. 4 Ch. 20.
(3) 4 D. J. & S. 63.
(4) 4 App. Cas. 615, 622.

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become well known, it was too late for a shareholder to repudiate shares which he had been induced to take by misrepresentation; and Lord Cairns went so far as to say that he would "be disposed in any case to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding-up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors." I may point out that in the present case, although it may be taken that the company was insolvent on October 12, yet the affidavit of the liquidator shews that it was still carrying on business. He says, "Up to Monday, the 12th inst., the collieries of the defendant company were in full working order"; and subsequently he says that the agent of the landlord who levied the distress had stopped all work at the collieries. Admitting, however, the existence of the rule laid down in *Tennent* v. *City of Glasgow Bank* (1), still the case there considered was one in which a shareholder was seeking to escape liability to any creditor, and therefore to withdraw from the operation of the winding-up a portion of the assets of the company. Here the contest is between two bodies of creditors, one the landlords of the property which the company hold, and the other the general body of creditors. It appears to me that entirely different considerations apply to such a case. I think that it would be inconsistent with the reasoning of Turner L.J. in *In re Great Ship Co.* (2) to apply the rule laid down by Lord Cairns to such a case. To defeat the distress, it should be made out that it is for some reason inequitable to allow it to proceed; here it is not even shewn that the distraining landlords knew of the passing of the resolution of September 24, even if such knowledge would be sufficient to raise an equity against them. There is no authority for such a proposition, and it hardly seems consistent with the ratio decidendi in *Ex parte McLaren* (3), where, in an analogous case relating to bankruptcy, it was held that a non-assenting creditor of a compounding debtor under s. 126 of the Bankruptcy Act, 1869, against whom no equity could be raised by reason of his personal conduct, could acquire

(1) 4 App. Cas. 615. (2) 4 D. J. & S. 63.
(3) 16 Ch. D. 534.

a valid security for his debt by levying execution on the debtor's goods at any time before the registration of an extraordinary resolution accepting the composition, even although such creditor had been present (but silent) at the meeting at which the resolution was passed.

It may perhaps be thought that if in such a case as the present the Court refuses to interfere, the passing of the first resolution to wind up will operate as an invitation to unpaid judgment creditors and landlords to use their legal remedies, and that the distribution of the assets of the company pari passu among the creditors in accordance with s. 133 will thus be interfered with. It may be that one of the objects of s. 84 of the Act of 1862, by which the time of the presentation of a petition is fixed as the commencement of a winding-up by the Court, was to prevent such a result. Still the fact remains that the Legislature did not see fit to make a voluntary winding-up commence at the passing of the first resolution; and in reality, as it seems to me, I am asked to fix the commencement, so far, at any rate, as relates to actions, suits, and other legal proceedings, at another date than that determined by the Act of Parliament. In my judgment, I ought not to do that; and consequently I think that the motions fail so far as they are based on s. 138 of the Companies Act, 1862.

[His Lordship then dealt with the question whether the power of distress in Lord Effingham's lease, so far as it related to chattels found upon the adjoining colliery, did not constitute the lease a bill of sale so as to require registration under the Bills of Sale Acts. Upon this question he came to the conclusion, first, that he was bound by the case of *Pulbrook* v. *Ashby* (1) to hold that this power of distress was as regards the goods seized a licence to take possession of personal chattels as security for a debt within s. 4 of the Bills of Sale Act, 1878; and, secondly, that the exception as to mining leases in s. 6 of that Act did not except the lease from the operation of s. 4. He therefore held that the distress was invalid, and ought to be restrained.]

(1) 56 L. J. (Q.B.) 376.

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The Earl of Effingham appealed. The appeal came on for hearing on January 11, 1897.

Hastings, Q.C., and *Upjohn*, for Lord Effingham. The injunction ought not to have been granted. The lease, being a mining lease, is expressly excepted from s. 6 of the Bills of Sale Act, 1878, and s. 4 (1) does not apply, and registration under the Act was not necessary. Sect. 6 is an extension of the definition of "bill of sale" contained in s. 4. The fact that this extension was considered necessary shews that the things mentioned in s. 6 were not already included in s. 4, and it cannot be supposed that, while a mining lease was excepted from the documents mentioned in s. 6, which, but for the exception, might have included such a lease, it was intended that it should at the same time be included in s. 4. In *In re Willis* (2) it was held that the proviso at the end of s. 6 applied only where the mortgagee had actually entered into possession of the mortgaged premises before demising them to the mortgagor. Every mining lease is excepted and every clause contained in it, unless it be a clause not really connected with the lease although it is inserted in it. Here the lease is

(1) By s. 4, "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred. . . ."

By s. 6, "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

"Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

(2) (1888) 21 Q. B. D. 384, 394.

nothing but a mining lease, and the object of the clause in question is only to secure the payment of the rent and royalties. So long as the lease does not go beyond its proper function of securing the rent (no matter in what way) it is simply a mining lease, and therefore excepted from s. 6.

In *Daniel* v. *Stepney* (1) it was held that assignees with notice were bound by a similar power of distress, even if it were not valid as against strangers. In the argument of that case in the Exchequer Chamber a passage in Co. Litt. 147a was relied upon as shewing that the power of distress was valid at common law, but the Court did not decide that point.

[A. L. Smith L.J. An agricultural lease containing an express power to distrain for rent would not be within the Act: *In re Willis.* (2)]

It would not. Mining leases must have been excepted for a reason, and it must have been because it is a common practice to insert this special power of distress in these leases. It is not a security for money lent; nothing but the rent is secured by it.

[Rigby L.J. referred to *Ex parte Jackson.* (3)]

The lease is not the less a mining lease because the lessor has taken this additional security for the rent.

[Lindley L.J. Was not the object of excepting mining leases to remove any difficulty with regard to a distress for royalties?]

This power to distrain on chattels not being on the demised colliery is limited to "adjoining or neighbouring collieries," the object being to enable the lessor to distrain upon chattels at the pit through which the demised coal is being worked. This special form of a power to distrain is to be found in many of the books of conveyancing precedents: see Davidson's Conveyancing Precedents, 2nd ed. vol. 5, p. 311.

[Rigby L.J. There the power is limited to the demised mines or any mine or mines worked in connection therewith.]

In another form (at pp. 395, 396) the words "in connection therewith" are omitted. The learned author suggests no doubt

(1) (1872) L. R. 7 Ex. 327; (1874) L. R. 9 Ex. 185.

(2) 21 Q. B. D. 384.

(3) 14 Ch. D. 725.

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as to the validity of the clause. See also Key and Elphinstone's Conveyancing Precedents, 3rd ed. (1890) vol. i. p. 878, where a similar form is given. But there the learned authors do in a note suggest a doubt whether, having regard to *Pulbrook* v. *Ashby* (1), such a power of distress is not invalidated by s. 4 of the Bills of Sale Act so far as it goes beyond the common law power of distress for rent. But *Pulbrook* v. *Ashby* (1) is distinguishable, for there the distress was for the price of goods sold, not for rent.

In *In re Stockton Iron Furnace Co.* (2) Jessel M.R. could not have meant that the Bills of Sale Act could be evaded by the device of an attornment clause: what he meant was that the Act had no application as between landlord and tenant. In that case the distress was levied before the Bills of Sale Act, 1878. It has always been admitted that ordinary agricultural leases are not within s. 4, for the object of the power of distress there is only to secure the rent. Sect. 4 applies only to a security for a debt. An ordinary attornment clause is within the latter part of s. 6; the words "debt or advance" would not have been used alone had it been intended to include ordinary rent.

In order to understand the Bills of Sale Acts their history must be followed: *In re Standard Manufacturing Co.* (3). Stirling J. has given no effect to the exception of mining leases from s. 6. If those leases are within s. 4, it would have been futile to except them from s. 6. Sects. 4 and 6 are in pari materiâ, and together form one definition section.

Buckley, Q.C., *Eustace Smith*, and *Younger*, for the company, and the plaintiff in the debenture-holders' action. The exception of mining leases from s. 6 tends to shew that otherwise all leases would have been within it, and so no doubt they are for some purposes. An instrument which is called a lease may be also something more than a lease, and, so far as it is something more, it is not protected by the exception. The reason for the exception of mining leases was that in such leases royalties (which are not necessarily "rent") are frequently reserved, and

(1) 56 L. J. (Q.B.) 376. (2) (1879) 10 Ch. D. 335.
(3) [1891] 1 Ch. 627, 645.

it was intended that the lessor should be able to levy a distress if the royalties were not paid.

Mining leases are not, strictly speaking, leases. The observations of Lord Cairns in *Gowan* v. *Christie* (1) shew their peculiar nature and the distinction between them and agricultural leases. His Lordship says: "Although we speak of a mineral lease or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase . . . . there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land." These observations are referred to as "a perfectly accurate statement" by Lord Blackburn in *Coltness Iron Co.* v. *Black*. (2) Thus a "mining lease" is, in reality, a sale of the minerals to be taken out of the demised land for a price to be paid in instalments. In *Daniel* v. *Stepney* (3) there was a power of distress similar to that in the present case; but the bill of sale point was not raised. The power of distress is in effect a licence to take possession of personal chattels as security for a debt, within s. 4 of the Bills of Sale Act, 1878, and, consequently, the lease containing it is a bill of sale which requires registration. If the decision of the learned judge in this case should not be upheld, the result would be prejudicial to landlords and a violation of the policy of the Legislature. For landlords on whose lands there are chattels which they have looked upon as a security for their rent will be exposed to the risk of having them swept away by virtue of a secret arrangement entered into with a neighbouring landlord.

But assuming that we fail upon this point, we contend that the distress ought still to be restrained, because the receiver on behalf of the debenture-holders, although appointed after seizure, was appointed before sale, and the debenture-holders are consequently entitled to priority: *In re Opera, Limited*. (4) In that case it was held that the sheriff on seizing, on behalf of an execution creditor, goods belonging to a limited company, took, before sale by him, subject to the rights of the holders of

(1) (1873) L. R. 2 H. L., Sc. 273, 283–4.
(2) (1881) 6 App. Cas. 315, 335.
(3) L. R. 7 Ex. 327.
(4) [1891] 3 Ch. 260.

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debentures charging all the property of the company; and the principles applicable to the present case are the same, because for this purpose there is no difference between distress and execution. *In re Marriage, Neave & Co.* (1) is a decision upon an analogous point.

Upjohn, in reply, referred to *In re Marriage, Neave & Co.* (1); *Krehl* v. *Great Central Gas Consumers Co.* (2); *Governments Stock and other Securities Investment Co.* v. *Manila Ry. Co.* (3); *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (4)

Younger, in reply upon the new cases referred to.

Cur. adv. vult.

1897. January 30. Lindley L.J. This is an appeal from an order of Stirling J. restraining a lessor of a seam of coal in Yorkshire from selling under a distress for rent goods of his lessee, but which goods were seized on lands not comprised in the lease. The learned judge held that the power to distrain for rent off the premises demised was a bill of sale within s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and that as the lease was not registered as a bill of sale the distress was invalid.

Another question was raised before us, which was that, assuming the power of distress to be valid, it was exercised too late to prevail against the debenture-holders of the company, which was the lessee. This latter question turns upon circumstances which have no bearing on the decision on the Bills of Sale Act, and for the present it will be convenient to consider those facts only which are material to the extremely important question to which that Act gives rise.

The Roundwood Colliery Company, Limited, is a company which at the date of the lease under which the distress was made was working a colliery at Rotherham, in Yorkshire, under a lease from a gentleman named Foljambe. This colliery had a shaft of its own through which the coal was raised, and which, of course, could be used for working any adjoining

(1) [1896] 2 Ch. 663.
(2) (1870) L. R. 5 Ex. 289.
(3) [1895] 2 Ch. 551, and [1897] A. C. 81.
(4) (1885) 29 Ch. D. 715.

minerals which the company might acquire and properly work through Foljambe's colliery. By a lease dated November 20, 1891, the Earl of Effingham demised to the company a seam of coal adjoining Foljambe's colliery at rents varying with the acreage worked. Although these rents were in the nature of royalties payable for the coal won, they were rents which could be distrained for at common law on the property demised without any express power of distress. This point was settled in *Daniel* v. *Gracie*. (1) The lease, however, contained a power in case of non-payment of the rent to distrain upon and sell the goods and chattels of the company "in or about any of the premises hereby demised or any adjoining or neighbouring collieries." These last words give rise to the difficulty which has arisen.

The seam of coal demised by this lease has always, in fact, been worked through the adjoining mine held by the company under Mr. Foljambe. It is plain, moreover, that this was always contemplated. The lease contained no demise of any surface lands; no provision was made for sinking any pit or shaft, and only one seam of coal was comprised in the lease. The words "neighbouring colliery" are large enough to apply to collieries in the neighbourhood not worked with the seam of coal demised. I am, however, of opinion that to construe those words in that wide sense would be unreasonable and extravagant. The power of distress must, in my opinion, be construed to apply to those neighbouring mines only which, though not actually adjoining the seam of coal demised, might be or become connected with it by underground workings. This is a matter of some importance; for, if the power of distraining off the property demised extended to any goods and chattels of the lessee on any mines in the neighbourhood wholly unconnected with the property demised, the power would be very unusual, and might well be regarded as a licence to seize and sell chattels as distinguished from a power of distress for rent. If, however, the power is read as I read it, that is, as confined to the goods of the lessees on adjoining or neighbouring mines worked with the seam of coal demised, the power is

(1) (1844) 6 Q. B. 145.

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one which is very common in mining leases where the minerals demised are to be worked through and with other mines worked by the same lessees.

The precedents referred to by Mr. Upjohn from Davidson's and Key and Elphinstone's well-known collections, and other precedents which are to be found in Bainbridge on Mines, 4th ed. p. 825, and in 3 Bythewood's Precedents by Robbins, 4th ed. p. 598, shew that such a power is by no means uncommon in mineral leases. I do not say it is a usual clause which would be inserted if parties differed, but it is a clause very commonly inserted in such cases as I have mentioned.

Passing now to the Bills of Sale Acts, and speaking of them generally, it is impossible to read the preamble of the Act of 1854, which is the first of the series, without seeing that those Acts are not Acts to amend the law of real property, or the law relating to leases. The object of the Acts is to prevent secret pledges of chattels for money lent. It was not their object to interfere with leases or powers of distress for rents, although provision is made by s. 6 of the Act of 1878 for attornments and leases and powers of distress created to secure the repayment of money lent on the security of chattels. I will return to this section presently. *Morton* v. *Woods* (1) went far to shew that the Act of 1854 did not apply to ordinary leases. In *Daniel* v. *Stepney* (2) the power of distress in a mining lease was extended to chattels off the land demised. The case was decided on demurrer. The pleadings might have raised, but did not raise, the point that the power was invalid under the Act of 1854 as against the plaintiffs, who were trustees for the lessee's creditors. The probable explanation of this is that, having regard to *Morton* v. *Woods* (1), the point was not considered worth raising; other cases, especially *In re Willis* (3) and *In re Standard Manufacturing Co.* (4), may also be referred to as shewing that distresses for rent, not reserved to secure some other debt, are outside the Bills of Sale Acts altogether.

As, however, the exact point which has to be determined has not yet been actually decided, it is necessary to examine more

(1) (1869) L. R. 4 Q. B. 293.
(2) L. R. 7 Ex. 327; 9 Ex. 185.
(3) 21 Q. B. D. 384.
(4) [1891] 1 Ch. 627.

closely ss. 4 and 6 of the Bills of Sale Act, 1878, on which the case really turns. [His Lordship referred to those sections, and continued:—] It is plain that s. 6 was inserted in order to extend the operation of s. 4. Sect. 4 says what a bill of sale shall include. Powers of distress for rent are not mentioned. The only words used in s. 4 which are material for the present purpose are "licences to take possession of personal chattels as security for any debt." Those words are the same as those used in the previous Act of 1854: see s. 7. But s. 6 is evidently based upon the supposition that powers of distress for rent are not within s. 4. Sect. 6 expressly deals with powers of distress, and says that such powers, if conferred by way of security for any debt or advance, are to be "deemed to be bills of sale"—language which plainly does not include an ordinary lease or distress for rent, which is not itself a security for some other debt. But then s. 6, whilst enacting that powers of distress if conferred by way of security for a debt or advance are to be deemed bills of sale, contains two exceptions—namely, (1.) mining leases, and (2.) leases at fair and reasonable rents by mortgagees in possession to their mortgagors. Why mining leases were excepted from s. 6 I cannot say. Possibly it was to prevent any doubt arising as to the validity of powers of distress for payments which cannot be distrained for at common law, especially in those so-called mining leases which are mere licences to win and remove minerals. Anyhow, s. 6 cannot invalidate any mining lease, nor any power of distress which is commonly inserted in such a document.

The case, therefore, stands thus. If the power of distress in the present case is to be regarded as a power of distress for rent, it is out of the Bills of Sale Act altogether, and is neither within s. 4 nor within s. 6 of the Act of 1878. If, on the other hand, the power of distress in the present case is not to be regarded as a power of distress for rent, but as a power of distress for a debt, so as to fall within s. 6, then, being a common form in a mining lease, it falls within the exception contained in the same section. Either way, therefore, it appears to me that this power is not invalidated by the Act of 1878. If, indeed, powers of distress for rent were "licences to take possession of personal

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chattels as security for any debt" within the meaning of s. 4, the case would be very different; for it is reasonably plain that the object and effect of s. 6 are to extend and not to curtail the operation of s. 4. The case of *Pulbrook* v. *Ashby* (1), on which Stirling J. relied, appears to me quite consistent with the above view. The power of distress there was not for rent, but for the price of goods sold. Such a power clearly falls within s. 4. The decision was quite right. I have no doubt that a power of distress for rent off property demised might be so unusual and suspicious as to justify the inference that a lease containing such a power was being used as a cloak for a transaction which really fell within s. 4 of the Act. But no such inference is possible in the present case. For these reasons I am unable to concur in the view taken by Stirling J. that the power of distress in this lease is invalid by reason of the Bills of Sale Act.

There remains the other point, to which the learned judge did not allude—namely, the right to distrain as against the debenture-holders of the company. The company had issued debentures in the ordinary form, and those debentures created what is called a floating charge on the goods and chattels of the company.

On October 12, 1896, the lessor distrained, and seized goods and chattels of the company which were off the property demised—namely, on Mr. Foljambe's adjoining colliery. On October 13, 1896, the resolution to wind up, passed on September 24, was confirmed, and a liquidator was appointed. The winding-up of the company commenced on this day. On October 14, 1896, judgment was given in the debenture-holders' action which had been commenced on October 1, and the receiver was effectively appointed, and he proceeded to take possession of the property of the company. Shortly afterwards applications were made by the liquidator and by the plaintiff in the debenture-holders' action to stay a sale of the goods distrained; and on November 28, 1896, an order staying the sale was made, on the ground that the distress was invalid under the Bills of Sale Act.

(1) 56 L. J. (Q.B.) 376.

This ground being, in my opinion, erroneous, it becomes necessary to consider the respective rights of the landlord and of the debenture-holders to the goods seized. These rights depend upon the question whether the landlord distrained while the debentures were still a floating security, or whether the debentures are to be regarded as having definitively attached to the goods seized, so that, as between the landlord and the debenture-holders, those goods had become the property of the latter before the landlord seized them.

It is not contended that the landlord could distrain off the property demised on goods which were not the goods of the company, both at law and in equity. The debenture-holders contend that the goods seized were not the goods of the company, except subject to the equitable charge created by the debentures. As between the debenture-holders and the company this proposition is true; but it does not decide the respective rights of the lessor and the debenture-holders, which is what we have to consider. The goods seized by the lessor were seized under a power conferred either before the debentures were issued or whilst they were clearly a floating security, and in either case that power could be exercised before the debentures ceased to be floating securities. They did not cease to be so before the distress was put in. The winding-up did not commence until after that date, nor was any effectual order for a receiver made until after the same date. The order of October 7 was never really effective. It was never drawn up, the lessor had no notice of it, and before the receiver could take possession he had to give security. The distress, having been made before the commencement of the winding-up of the company, and before a receiver was effectively appointed, was, in my opinion, valid as against the debenture-holders.

This conclusion is in accordance with the decision in *Biggerstaff* v. *Rowatt's Wharf Co.* (1), and is not at all inconsistent with *In re Opera, Limited* (2), in which it was held that the sheriff could only seize the goods of a company subject to the equitable rights of the debenture-holders. The right of the sheriff to seize was not conferred by the debtor either before

(1) [1896] 2 Ch. 93. (2) [1891] 3 Ch. 260.

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the debentures were issued or afterwards with the implied authority of their holders. For these reasons, I am of opinion that the appeal should be allowed and the order appealed from should be reversed, with costs both here and below. If the goods seized have been sold by the receiver, he must pay over the proceeds of sale to the lessor, or so much of them as may be necessary to cover the rent distrained for and the costs of the distress.

A. L. SMITH L.J. In this case this Court is asked to hold that a mining lease granted by the Earl of Effingham for the purpose of enabling his lessees to work the demised coal, reserving therefor an acreage rent, is a bill of sale within the meaning of the Bills of Sale Acts, and, consequently, that the lease is void, it not having been registered pursuant to those Acts. [His Lordship then stated the facts of the case, and continued :—]

The question is, Is this lease by Lord Effingham a bill of sale? I should have thought off-hand that the answer would be No; but Stirling J. has held the contrary, and, as in argument it has been stoutly insisted by Mr. Buckley that he is right, the matter obviously requires serious examination.

Now, in the first place, I cannot doubt that, had the express power of distress in default of payment of the contracted rent contained in this lease by Lord Effingham been confined to seizing, distraining, selling, and disposing of the lessees' chattels in or about the demised premises, it could not have been maintained that the power caused the lease to be a bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1878; for though such a power might be said to be within the words "a licence to take possession of personal chattels as security for any debt," yet, in my judgment, such a power is not within either the object of or the mischief aimed at by the Bills of Sale Acts, which apply to dealings between creditors and debtors, and not to leases between landlords and tenants.

The object of the Bills of Sale Acts was not to bring bonâ fide leases within the provisions of those Acts. Such leases are outside of these Acts altogether.

In the case of *In re Willis* (1) Lindley L.J. sets forth the true view of the provisions of the Bills of Sale Acts of 1854 and 1878. He points out that if these Acts were looked at, it would be seen that what the Legislature was aiming at was not the case of leases between landlords and tenants, but the rendering it compulsory on lenders of money on the security of goods and chattels to register their securities; and that if money be lent on the security of chattels, this must be done by a registered bill of sale; and in this I entirely agree.

Bowen L.J. also, when delivering the judgment of this Court in *In re Standard Manufacturing Co.* (2), shewed that, until the passing of the Act of 1882, the express and avowed design of the Legislature was to strike at frauds perpetrated upon creditors by secret bills of sale; and that, although the general words in the Act (the question before the Court then was whether debentures of a joint stock company were bills of sale) were large enough to include debentures, yet they could not, considering the manifest object of the Acts, be brought within their meaning. I cannot think that though in a mining lease, or indeed in any other lease, there be an express power to distrain upon the demised premises, such a power comes within the true meaning of the words "licences to take possession of personal chattels as a security for any debt," and thus renders the lease a bill of sale; and I have no doubt it does not. Indeed, this was not disputed at the Bar; but why not, if such a power is within the actual words of s. 4?

It was said that such an express power in a lease was merely the expression of the right every landlord possessed at common law—namely, a right of distress upon the demised premises—and was not, therefore, within the meaning of the words of the section; but I think that the true answer to be given is, because real leases with real rents reserved are not within the scope of the Bills of Sale Acts at all. I do not doubt that there may be provisions inserted in a lease which would bring the instrument, although principally a lease, within the provisions of the Bills of Sale Acts; and the case of *Pulbrook* v. *Ashby* (3) is an

(1) 21 Q. B. D. 384. (2) [1891] 1 Ch. 645.
(3) 56 L. J. (Q.B.) 376.

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instance of this. There, by the lease, the landlord took an express power to distrain upon the demised premises for money due for goods sold and delivered by him to the tenant; and this power of distress was held to be a licence to take possession of personal chattels as security for a debt within s. 4; and in this I agree. It was a power having no relation whatever to rent due from a tenant to his landlord; it was altogether outside the relationship of landlord and tenant, and had reference to that of debtor and creditor. To get a lease within s. 4 of the Act of 1878 there must be in the lease something in addition to, and dehors the lease, which was against provisions of the Bills of Sale Acts.

Stirling J. said the present case was "on all-fours with that of a lessor granting an ordinary lease of a house, but reserving to himself a power to distrain on goods of the lessee found in another house not comprised in the lease"; and he thought that "such a power would be a licence to take possession of personal chattels as security for a debt." Such a power, I apprehend, would be wholly exceptional if not unique. I never saw the like. If the power to distrain in the present case gave power to distrain upon the goods of the lessee, say, in Grosvenor Square, as was put in argument, I should have thought that such an exceptional and peculiar power might legitimately give rise to the inference that it was not really a power whereby to enforce the landlord's usual and ordinary rights against his tenant, but was inserted for some other purpose foreign to the relationship of landlord and tenant, in which case the instrument might well be held to be a lease and something more, which something more might then come within the words of s. 4 as "a licence to take possession of personal chattels as a security for a debt," and thus be a bill of sale and require to be registered.

But that case is not this case.

In the present case the power to distrain upon "any adjoining or neighbouring collieries" is by no means unique or exceptional in mining leases. It is a power inserted in mining leases when it is intended that two collieries are to be worked together as in the present case; and so we find a like power was inserted in the lease by Mr. Foljambe; similar forms of powers are to be

found in the recognised and well known precedents of forms of mining leases. To these Lindley L.J. has referred. The true construction of this power to distrain "on any adjoining or neighbouring collieries" is not, in my opinion, a power that the lessor may distrain upon the lessee's chattels upon any collieries in the neighbourhood, no matter where situated, upon which the lessee might happen to have chattels. The power is expressly confined to adjoining or neighbouring collieries; and it would be a most unreasonable and not the true construction of the power to hold that it extended to collieries wholly unconnected with the demised seams of coal. It is a power limited by the subject-matter to which it was applied—namely, a power to distrain upon an adjoining or neighbouring colliery worked, as in this case, in connection with the demised premises.

I cannot bring myself to think that the present lease is a mining lease and something more; for in my judgment it is a mining lease and nothing more, and therefore not a bill of sale within the true intent and meaning of s. 4 of the Act of 1878.

As regards the argument of Mr. Graham Hastings for the Earl, founded upon s. 6—namely, that this section comprises real bonâ fide transactions between real landlords and real tenants, in which are reserved real rentals, and consequently as leases are within s. 6, they are not within s. 4—I am by no means convinced that s. 6 applies in any way to what I will call real bonâ fide leases between landlord and tenant with real rents, and in my opinion it does not. In my view, s. 6 was intended to defeat the scheme of lenders of money who had resort to forms embracing ostensibly the relation of landlords and tenants for the purpose of securing their advances and the accruing interest thereon, and that it does not embrace the case of real bonâ fide leases with actual rents; but if I am wrong as to this, and s. 6 does include such leases, though I think it does not, then it is obvious it does not include the present case, for mining leases are expressly excepted from the section.

As regards the further point which was taken by Mr. Buckley, that if the power to distrain be held valid and the lease not a bill of sale, in this case the distress could not be made effective

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against the debenture-holders. I have nothing to add to what my brother Lindley has said thereon, and I agree with him.

For these reasons I think this appeal must be allowed.

Rigby L.J. Concurring as I do in the judgments already given, I will only, out of respect for the learned judge from whose judgment we are differing, say as much as will explain my view on the construction of the Bills of Sale Act. By s. 3 (I will not read the whole of it) the Act is to apply to every bill of sale "whereby the holder or grantee has power to seize or take possession of any personal chattels made the subject of such bill of sale." The definition of "bill of sale" which is contained in s. 4 comprises "licences to take possession of personal chattels as security for any debt"—words which were found in the previous Act of 1854.

Now, having regard to the purview of the Bills of Sale Act, I am satisfied that it never was intended to include powers of distress contained in mining leases or others which are reserved or incident by the common law to landlords in any usual or well known form of lease. I think that this was clearly established before the passing of the Act of 1878; and, indeed, there were decisions which seem to me to have gone much further, namely, those which have held that, where in mortgages there was an attornment at what is called a rent, and what technically is a rent, but which was not a rent incident to any ordinary agreement between landlord and tenant, but a mere security for money, that was nevertheless outside the Act. By reason of those decisions it was thought necessary to include such rents in the Amendment Act of 1878, s. 6; the effect of which is, to my mind, to say that, with the express exception therein contained of mining leases, and leases made by mortgagees who have actually entered into possession and actually made a demise to their mortgagors, these artificial rents so created by attornment, and also by powers of distress, are not to be treated as arrangements between landlord and tenant; but that the existence of them will be treated as nothing more than giving licences to seize chattels as security for a debt, and that, therefore, they are within the Bills of Sale Act. Therefore, for my part, I do

not doubt that the power of distress, even though it be contained and included in the lease, may be of such a nature as to be entirely outside the scope of ordinary agreements between landlord and tenant, and I should accept such a case as that of a brewer's lease as one of those cases.

I think that if in a lease you take a power of distress over property entirely unconnected with the demised premises, that would be outside; as, for instance, where there is a demise of one house (as in the case put by the learned judge) with a power of distress over the chattels in another. That is because no one could suppose that in the ordinary course of events the owner of a town house had in any way pledged his furniture for the rent of a property which might be situated far away in the country, and with which there was no apparent connection at all. Such a power of distress, it appears to me, would really be a licence to seize whatever chattels there might be in the house at the time when it was exercised; and with regard to those chattels upon that house the rent would not be rent at all —it would be a debt and nothing else.

That being so, we have to consider whether we can distinguish the present case from cases of that description.

I think we can, and on this plain ground: that here we have a mining lease containing provisions which, construed as they have been by Lindley L.J. (a construction which I do not differ from), are, I will not say "usual," because I have no means of knowing whether they are usual or not, but, at any rate, not uncommon and not unreasonable terms in a mining lease, where the minerals are of necessity worked through an adjoining or neighbouring mine in the sense which we give to the words in this lease, and where the chattels may or may not be, at the moment when a distress is being put in, on the very mine which is the subject of the lease, or on the mine through which the minerals are being carried. Of course, the reasonableness of that view is made more clear by the fact that there may be mining leases in which powers of distress are given, although there be no absolute interest in any land or in any minerals demised. Though a well known incident of the mining industry, they are not in any way, according to my view, within

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the meaning of the Bills of Sale Act. I think, therefore, that this power of distress is fairly within what is understood to be an arrangement between the owner of a mine and the person who works, under a lease from him or a licence from him, through a neighbouring mine.

With regard to the other question, about debenture-holders, since the learned judge did not deal with that, I have nothing to add. I say nothing at all except that I agree.

Solicitors: *Bell, Brodrick & Gray, for Parker, Rhodes & Co., Rotherham; J. & R. Gole, for Pashley & Hodgkinson, Rotherham.*

W. W. K.

C. A. 1897 *Feb.* 15.

In re McGAREL (a Lunatic).

Solicitor—Remuneration—Lease—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order thereunder, Sched. I., Part II., Scale of Charges.*

In the case of leases at a rack-rent to which the scale of charges in Sched. I., Part II., of the General Order under the Solicitors' Remuneration Act, 1881, is applicable, the solicitor of the lessor is not entitled, where the annual rent exceeds 100*l.*, to charge any percentage on fractional amounts of 100*l.* in the rental.

Adjourned Summons.

In July, 1887, the committee of the estate of a lunatic was authorized by the Master in Lunacy to take a seven years' lease from September 29, 1887, of a house, as a residence for the lunatic, at the annual rent of 350*l.* In respect of business connected with the lease, the committee paid to the solicitor of the lessor a fee of 13*l.* 15*s.* as his remuneration according to the scale in the General Order under the Solicitors' Remuneration Act, 1881—namely, 7*l.* 10*s.* for the first 100*l.* of the rent, 2*l.* 10*s.* for the second 100*l.*, 2*l.* 10*s.* for the third 100*l.*, and 1*l.* 5*s.* for the remaining 50*l.* And at the same time the committee paid to his own solicitor, as his remuneration under the same scale, one-half of the above amounts.

On August 1, 1894, an order was made in the Lunacy giving to the committee liberty to renew the lease for a further term of

seven years at the same rental. This he did, and he paid to the lessor's solicitor and to his own solicitor respectively, as their remuneration in respect of the business connected with the renewal of the lease, fees similar to those paid on the former occasion. He then carried in his costs, charges, and expenses for taxation in the Lunacy in order that they might be allowed to him out of the estate, and Mr. Ferrand Corley, the principal clerk to the Masters in Lunacy, who is now the taxing officer in Lunacy (1), disallowed in the case of each set of solicitors the fee of 1*l.* 5*s.* and 12*s.* 6*d.* respectively paid in respect of the last 50*l.* of the rent.

The committee then carried in objections to the disallowance of those fees on the ground that they had been actually paid by him, and were the proper fees payable under Sched. I., Part II., of the General Order under the Act of 1881, "being calculated as therein directed on the total amount of the rent, and not on the even hundreds only" of the rental. (2)

(1) Under the Rules in Lunacy, 1892, r. 114, costs of proceedings in Lunacy are to be taxed by and under the direction of the Masters in Lunacy.

(2) Part II. of Sched. I. to that order provides by the first scale, which applies to leases at rack-rent, that the remuneration of the lessor's solicitor "for preparing, settling, and completing lease and counterpart" shall be "where the rent does not exceed 100*l.*, 7*l.* 10*s.* per cent. on the rental, but not less in any case than 5*l.*"; "where the rent exceeds 100*l.* and does not exceed 500*l.*, 7*l.* 10*s.* in respect of the first 100*l.* of rent, and 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent." The lessee's solicitor is to charge "for perusing draft and completing, one half of the amount payable to the lessor's solicitor."

By the second scale, which applies (inter alia) to "building leases reserving rent, or other long leases not at rack-rent (except mining leases)," the remuneration of the lessor's solicitor is to be, where the rent "does not exceed 5*l.*, 5*l.*"; where the rent "exceeds 5*l.* and does not exceed 50*l.*, the same payment as on a rent of 5*l.* and also 20 per cent. on the excess beyond 5*l.*" Where the rent "exceeds 50*l.*, but does not exceed 150*l.*," "the same payment as on a rent of 50*l.*, and 10 per cent. on the excess beyond 50*l.*" Where the rent "exceeds 150*l.*, the same payment as on a rent of 150*l.*, and 5 per cent. on the excess beyond 150*l.*"

Then follow "rules applicable to Part II. of Sched. I. as to all leases, ... other than mining leases." By rule 6, "fractions of 5*l.* are to be reckoned as 5*l.*"

By rule 7 of the rules applicable to Part I. of Sched. I. (which contains the scale of charges on sales, purchases, and mortgages), "Fractions of 100*l.*, under 50*l.*, are to be reckoned as 50*l.* Fractions of 100*l.*, above 50*l.*, are to be reckoned as 100*l.*"

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In answer to these objections, the taxing officer stated that in making the disallowance he had followed the practice of the Chancery taxing masters; and he gave the following reasons for the disallowance:—

"The words '7*l.* 10*s.* per cent.' appear in the first portion of the scale only, and it is to be noticed that the words 'per cent.' are omitted altogether in the 2nd and 3rd clauses.

"The contention of the objectant is that he is not only entitled to 2*l.* 10*s.* on the second and third 100*l.* of rent, but to 1*l.* 5*s.* on the 50*l.* This obviously requires the words 'per cent.' to be read into the clause, whereas such words do not occur there, and I submit that the true meaning is that the 2*l.* 10*s.* only accrues when there is an entire subsequent 100*l.* of rent, and that there is nothing at all to allow, in cases above 100*l.*, for any part of a subsequent 100*l.*, whether above or below 50*l.*, or for 50*l.* itself.

"It is conceivable that the omission of the words 'per cent.' by the framers of the rule was not accidental but intentional: because it might be deemed that where the amount of the rent was increased, and the labour was not materially greater, some slight additional remuneration would be adequate, such as that stated—namely, '2*l.* 10*s.* for each subsequent 100*l.* of rent,' and for still higher rents '1*l.* in respect of every subsequent 100*l.*,' without meaning that there should be (as in the earlier clause) a percentage running on parts of 100*l.* If a percentage on parts of 100*l.* is meant, then it would follow that, on a rent of 505*l.*, the additional remuneration would be an odd shilling for the lessor, and sixpence for the lessee: a minute allowance different from all other percentages given in the Order.

"The language in the next or second scale supports my view that the omission of the words 'per cent.' must have been intentional in the portions of the first scale now under consideration, because the same words are there carefully repeated all the way through, and the meaning is perfectly free from doubt.

"There is no provision in the rules applicable to Part II. like rule 7 to Part I., which provides that fractions of 100*l.* under 50*l.* are to be reckoned as 50*l.*, &c.; but rule 6 of Part II.

provides that fractions of 5*l.* are to be reckoned as 5*l.*, and this is cited in support of the objections. This rule clearly applies only to rents under 100*l.* where a percentage is given, and I fail to see how the rule can be applicable to the present case until the correctness of the objectant's view is established. There are parts of both scales to which rule 6 is now applicable, but there is nothing in it that I can see to justify the contention that when '100*l.* of rent' is spoken of it means that fractions of 100*l.* are to be proportionately reckoned.

"There are no cases that I am aware of bearing upon the construction of this particular scale; but *In re Field* (1), *In re Emanuel and Simmonds* (2), and *In re Negus* (3) are considered by the objectant to be in his favour, as the scale allowances there appear to coincide with his reading of the rule. But in none of those cases was there any question as to the manner in which the scale remuneration was to be reckoned. The questions were wholly whether the business transacted was within the scale, and whether the solicitor could charge for work supposed to be transacted outside the scale. If it be true that the scale was in any or all of those cases applied on what may turn out to be an erroneous system of reckoning, it is also the fact that the quantum so arrived at was not challenged, or the attention of the Court drawn to it, and it is clear that the point now raised received no consideration whatever.

"Under these circumstances, I cannot see the value of the inference derived from those cases.

"From the frequency with which costs of leases are being dealt with, it is important to have the point settled."

The committee then took out a summons in the Lunacy, asking that the objections to the taxation might be allowed, and that it might be referred back to the Masters in Lunacy to vary the certificate, and this summons was, by direction of Rigby L.J., adjourned into Court.

R. F. Norton, for the committee. The taxing master was wrong in disallowing the charge of 1*l.* 5*s.* in respect of the

(1) (1885) 29 Ch. D. 608. (2) (1886) 33 Ch. D. 40.
(3) [1895] 1 Ch. 73.

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50*l.* rent beyond the 300*l.* He has not rightly construed Part II. of Sched. I. to the General Order under the Solicitors' Remuneration Act of 1881. Rule 6 applies to the whole of Part II. of Sched. I., and, therefore, to a rent which exceeds 100*l.*; and it shews that it was intended that, for fractions of 100*l.* rent, the solicitor should be paid a proportionate fee. Rule 6 is equivalent to rule 7 in Part I. of Sched. I., which applies to sales, purchases, and mortgages. Though the words "per cent." are used only with reference to the first 100*l.* of rent, they are implied with regard to rents of higher amounts. It is reasonably clear that a percentage was intended in all cases: *In re Emanuel and Simmonds.* (1) In that case Lindley L.J., referring to Part II. of Sched. I., said (2): "We find there a scale of remuneration calculated on a certain percentage of the rental."

That the practice of the taxing masters of the Chancery Division has been in accordance with our argument is shewn by *In re Negus.* (3) The point was not raised there, but in fact the taxing master had allowed a fee of 12*l.* 5*s.* in respect of a rent of 290*l.*

Borthwick, for the next of kin of the lunatic, was not called upon.

Lindley L.J. In my opinion the decision of the taxing master is perfectly right. Indeed, but for the ingenious argument of Mr. Norton, I should not have thought the point arguable. The case falls within the first scale of Schedule I. Part II. to the General Order under the Solicitors' Remuneration Act, which applies to leases at a rack-rent. It provides for the costs of the lessor's solicitor, and the first item in the scale is this: "Where the rent does not exceed 100*l.*—7*l.* 10*s.* per cent. on the rental, but not less in any case than 5*l.*" There the solicitor's remuneration is clearly to be a percentage upon the rental. In the next item we come to cases where the rent exceeds 100*l.*, and there the language is this: "Where the rent exceeds 100*l.*, and does not exceed 500*l.*—7*l.* 10*s.* in respect of

(1) 33 Ch. D. 40. (2) 33 Ch. D. 49.
(3) [1895] 1 Ch. 73, 74.

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the first 100*l.* of rent, and 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent." So here the words "per cent." are omitted, and similarly, where it goes on to provide for other cases, there is no percentage, and I think the omission is intentional. What was in the minds of the persons who framed this schedule is obvious. They were solicitors who perfectly well understood what they were about. They had already got a large fee of 7*l.* 10*s.*, and it is quite evident that they were not thinking of a remuneration by a percentage after the first 100*l.* of rent, and considered that 2*l.* 10*s.* was a sufficient allowance for each subsequent 100*l.*

When we come to the second scale however which applies to "building leases reserving rent, or other long leases not at rack-rent," we find that the solicitor's remuneration is regulated by a percentage throughout when the rent exceeds 5*l.*

Then comes rule 6 of Part II.: "Fractions of 5*l.* are to be reckoned as 5*l.*" I agree that that rule applies to both scales, and it is quite intelligible. It applies to the first scale as regards rents between 65*l.* and 100*l.*, and it applies to all cases which fall within the second scale; but it has no application to the case with which we are now dealing. I think the taxing master was quite right.

A. L. Smith L.J. I concur. We cannot allow this appeal without altering the phraseology of the schedule.

Rigby L.J. I entirely agree.

Solicitors: *Frere, Cholmeley & Co.; Lawford, Waterhouse & Lawford.*

W. W. K.

C. A. 1897 Feb. 11, 12, 20.

In re THOMAS EDWARD BRINSMEAD & SONS.

[00200 of 1896.]

Company—Winding-up—"Just and Equitable"—Substratum gone—Fraud—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 5.

A company fraudulent in its inception, carrying on a small business at a loss, having no capital of its own—all the subscribed capital having found its way into the hands of the real, though not the ostensible, promoters—and hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud, was ordered by the Court of Appeal (affirming Vaughan Williams J.) to be wound up, the Court holding that the case was one in which it was "just and equitable," within s. 79, sub-s. 5, of the Companies Act, 1862, to make the order, that being the most effective means for recovering for the shareholders the money dishonestly retained by the real promoters.

Appeal from Vaughan Williams J. (1)

For the purpose of the present report it is necessary to supplement the statement in the former report with the following additional facts.

On July 1, 1896, the three Brinsmeads (Thomas Edward and his two sons) agreed to sell their business to Joseph Henry Davies, deceased, as "of 28, Finsbury Circus," for 6000*l.*, 1000*l.* being payable in cash and 5000*l.* in shares in the then proposed company, "Thomas Edward Brinsmead & Sons, Limited." On the same day Francis William Jordan and Henry William Allabone, as joint lessees for the Brinsmeads of the premises in Ferdinand Street, St. Pancras (mentioned in the former report), agreed to sell those premises to Davies for 9000*l.* in cash and shares.

By an agreement dated the following day and made between Davies, as "the vendor" of the proposed company, of the one part, and Stephenson Wilson, as "trustee" for the company, of the other part, Davies agreed to sell to the company all the premises, machinery and tools, and benefits of contracts and business of the company for the sum of 76,650*l.* to be

(1) Ante, p. 45.

paid, as to 66,650*l.* in cash, and, as to 10,000*l.*, in deferred shares of the proposed company. By clause 7 Davies covenanted with Wilson that the dividend for the first three years on the subscribed capital of the company should not be less than 8 per cent. per annum, and, in order to secure the payment thereof, to lodge with the company the sum of 9000*l.*

After the order for the winding-up of the company was made on December 3, 1896, as already reported, inquiries were instituted in the winding-up by Mr. G. S. Barnes, the Senior Official Receiver, acting under the Companies (Winding-up) Act, 1890, with a view to ascertaining the circumstances under which the company had been promoted and floated. The result of those inquiries was shortly as follows.

In the beginning of the year 1896, Thomas Edward Brinsmead, who was then admittedly insolvent, procured the assistance of the above-named Francis William Jordan and another person named Eli in promoting the first company of "Thomas Edward Brinsmead & Sons, Limited" (mentioned in the former report), for taking over the business which had been carried on by T. E. Brinsmead and his partners. This company was registered in March, 1896, the price payable by the company for the business being 6000*l.* in shares of which 3850 were to go to Jordan, 2000 to Eli, and the remaining 150 to T. E. Brinsmead and his partners. In the following month, April, the company passed resolutions for a voluntary winding-up, and Jordan was appointed liquidator. Then followed the various devices for forming and introducing to the public the present company of "Thomas Edward Brinsmead & Sons, Limited," among those devices being the two agreements of July 1, and the agreement of July 2, 1896.

The property comprised in the two agreements of July 1, 1896, was, it appeared, under 1000*l.* in value, but yet by those agreements it purported to be sold to Davies for a total sum of 15,000*l.*, while by the agreement of July 2 this same property was, as above stated, expressed to be sold by Davies to the present company for 76,650*l.*

Then came the issue of the prospectus, which expressly called attention to the fact that Davies had guaranteed an 8 per cent.

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dividend for a minimum period of three years, and would lodge with trustees for the shareholders a sufficient sum of cash to secure the due payment thereof. By this prospectus 513 persons were induced to take shares to the amount of 58,325*l.*, of which 30,835*l.* was paid up in the four months between July 22, the date of the registration of the company, and December 3, the date of the winding-up order. Davies received, on account of the purchase-money, shares to the amount of 40,000*l.* and large sums of cash. By this means the sum of 9000*l.* was lodged in the joint names of Dr. Jacob Bradford, a director and the chairman of the board, and Mr. Thomson, the solicitor of the company, to answer Davies's guarantee of the 8 per cent. dividend. Davies, it now turned out, was a person of no means whatever, occupying one room in a small house in Clerkenwell at a rent of 5*s.* a week. He had since disappeared, and Stephenson Wilson, the "trustee" under the agreement of July 2, 1896, who had figured as the secretary of the company, had also disappeared. The real promoters of the company were, it was elicited, another company called the "Consolidated Contract Corporation, Limited," Davies being a mere "dummy" employed by them in the promotion of the present Brinsmead Company. Again, the directors named in the prospectus of the Brinsmead Company were, it appeared, simply puppets of the Contract Corporation. They comprised the three Brinsmeads, who were persons of no means, and Dr. Jacob Bradford, the chairman, whose qualification shares were paid for by the Contract Corporation, and another was an undischarged bankrupt. None of the money subscribed by the shareholders of the Brinsmead Company ever found its way into the coffers of that company, but practically the whole of it passed to the Contract Corporation, through their "dummy," Davies; and it was said that, so far as the investigations had gone, a sum of at least 35,000*l.* properly belonging to the Brinsmead Company had been traced as having gone to the Contract Corporation.

During the four months from August 11, 1896, when the injunction was granted by North J., to December 3, 1896, the date of the winding-up order, the Brinsmead Company continued

to carry on business, but at a loss of upwards of 700*l.*, and before the presentation of the winding-up petition no less than eighty-six shareholders had commenced actions against the company for the removal of their names from the register on the ground of fraudulent misrepresentation in the prospectus, and those actions were still pending.

The present appeal was by the company, and also by two shareholders, one being Dr. Bradford, who, as already mentioned, was a mere puppet of the Contract Corporation, and the other being one George Tomlin, who had applied for 100 shares but had never paid anything on them, not even his application money.

The circumstances attending the formation of the company, its history during its brief existence, and the facts brought to light in the winding-up proceedings, are fully stated in the judgment of the Court of Appeal.

Sir R. T. Reid, Q.C., Eve, Q.C., and *Mark L. Romer,* for the appellants. The three reasons given by the learned judge below for making a winding-up order are, we submit, insufficient. First, he says that a material part of the substratum of the business which the company was to carry on is gone. But North J. has said that the business of manufacturing pianos can be carried on notwithstanding the injunction. To justify a winding-up order the whole substratum must have gone. Secondly, the learned judge says that there was fraud in the inception of the company, though he does not say against whom the fraud has been committed. If against the firm of John Brinsmead & Sons, they have their remedy; if against the shareholders, that is not a ground for winding-up, for they may waive the fraud: *In re Haven Gold Mining Co.* (1); and they have waived it. And thirdly, the learned judge says that, taken with the other circumstances of the case, the increased facilities for litigation to persons who considered they had been wronged were a ground for making a winding-up order, though he admits that "standing alone" that would not be a sufficient ground. The learned judge goes so far as to say, at the very end of his

(1) (1882) 20 Ch. D. 151.

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judgment, that he thinks "the majority of the shareholders have a good business capable of being carried on," and yet he makes a winding-up order because a minority of shareholders do not want the company to go on. His decision is thus based on several distinct grounds each of which is insufficient of itself, and, taken together, do not support each other. The petition is based upon s. 79, sub-s. 5, of the Companies Act, 1862, which says that a company may be wound up by the Court "whenever the Court is of opinion that it is just and equitable that the company should be wound up." The words "just and equitable" have always been interpreted as confined to matters ejusdem generis as those mentioned in the previous sub-sections, none of which apply here. Sect. 80, which defines what is meant by a company being unable to pay its debts, does not include the possible result of a company continuing its business when, as has been found here, the company has a business which it can carry on, and which a majority of the shareholders wish to be carried on. The doctrine of "just and equitable" must not be extended beyond what has now been settled by a long series of authorities commencing with *Ex parte Spackman* (1), cited with approval in *In re Suburban Hotel Co.* (2) The result of these authorities is that, to obtain a winding-up order, you must shew that the whole—not part only—of the substratum of the company is gone, so that persons cannot be compelled to remain in it, or that the company is a bubble company, that is, a company formed for some other purpose than the ostensible one. Here it is sought to extend the doctrine to a case in which the whole substratum is not gone, and in which the company is not a bubble company. Neither is it by any means clear that an examination could be had under s. 8 of the Companies (Winding-up) Act, 1890: *In re General Phosphate Corporation* (3); *Ex parte Barnes.* (4) The limitation of the use of the name "Brinsmead & Sons" does not destroy the company's substratum: its name may be modified by special resolution, with the approval of the Board of Trade, under s. 13 of the Companies Act, 1862, and that name, even when

(1) (1849) 1 Mac. & G. 170.
(2) (1867) L. R. 2 Ch. 737.
(3) [1895] 1 Ch. 3.
(4) [1896] A. C. 146.

modified, the learned judge below has found to be a valuable asset.

[RIGBY L.J. How can a fraudulent user by a workman of the name of his employer be a "valuable asset"? I do not see how any one who knew, as we now know, how the name of "Brinsmead" came to be used by this company, could consider it a "valuable asset."]

The company has been allowed by an order of the Court to retain the name, but with a qualification, and if they have the name, they have an essential element towards carrying on the business successfully: therefore the whole substratum has not gone. We do not deny the fraud in the promotion of the company, but, as we have said, that is not a sufficient ground for a winding-up order, when the shareholders have waived the fraud. It should be left to those concerned, namely, the shareholders, to say whether they will go on or not. The Court will not interfere in matters which can be dealt with by a domestic forum and may be decided by the will of the majority, unless the majority has not acted bonâ fide: *In re Langham Skating Rink Co.* (1)

Warmington, Q.C., and *C. Lyttelton Chubb*, for the respondent, J. W. Richardson, the petitioner. It is now apparent from the proceedings in the winding-up that this company was fraudulent in its inception; that, as to the position of the appellants, the company has no money, and is really the creature of the Consolidated Contract Corporation; that Bradford is not an independent shareholder, but had his shares provided for him by the Contract Corporation, and that the remaining appellant, Tomlin, has not paid a penny upon his shares. This is, in fact, not a bonâ fide appeal: it is, in truth, instigated by the Contract Corporation, and is intended to prevent the arm of the law from reaching the persons who have, it turns out, got some 35,000*l.* of the shareholders' money. In short, this company was formed to commit a fraud, and the real appellants are the Contract Corporation and no one else. The whole of the circumstances in this case shew that it is "just and equitable" that a winding-up order

(1) (1877) 5 Ch. D. 669, 684, 685.

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should be made. It is an extraordinary thing if a company which was formed to rob the public by using a name to which they were not entitled could not be stopped.

The law is stated in *In re London and County Coal Co.* (1), where Page Wood V.-C. held, the case being that of a company which had been fraudulently formed, that if there had been a bonâ fide intention to carry on business a winding-up order would not have been made. Here this company was conceived in fraud, and the appellants have no bonâ fide object in view.

[Rigby L.J. referred to *In re Diamond Fuel Co.* (2)]

As in that case, there is here a "reasonable probability," if a winding-up order is made, of something being recovered for the shareholders. When a company is unable to carry on the business for which it was ostensibly formed, a winding-up is the proper course, for the substratum is gone: *In re German Date Coffee Co.* (3) What the petitioner in the present case was asked to do was to take shares in a company entitled to carry on business under the name mentioned in the prospectus, and to participate in a business which the directors said was worth 76,650*l.* But this company is not the thing he bargained for, inasmuch as it cannot carry on business under the name mentioned in the prospectus, unless it is modified, and the business is worth practically nothing.

[They also referred to the judgment of Lord Cottenham L.C. in *Ex parte Spackman* (4), and to the judgment of Thesiger L.J. in *In re Diamond Fuel Co.* (5)]

Stokes and *Duka,* for shareholders in opposition to the appeal and in support of the winding-up order.

Eve, Q.C., in reply.

Cur. adv. vult.

Feb. 20. The judgment of the Court (Lindley, A. L. Smith, and Rigby L.JJ.) was delivered by

A. L. Smith L.J. The question we have to decide in this case is whether, within the meaning of s. 79, sub-s. 5, of the

(1) (1866) L. R. 3 Eq. 355.
(2) (1879) 13 Ch. D. 400.
(3) (1882) 20 Ch. D. 169, 177, 186.
(4) 1 Mac. & G. 170.
(5) 13 Ch. D. 410, 411.

Companies Act, 1862, it is just and equitable that a company called "Thomas Edward Brinsmead & Sons, Limited," should be wound up by the Court. Vaughan Williams J. came to the conclusion that it was, and upon December 3, 1896, he made the order. We do not propose to recapitulate the circumstances which led to the formation of the company. This Court went fully into them upon an appeal brought against an injunction granted by North J. on August 11, 1896, restraining the company from using the name of Thomas Edward Brinsmead & Sons, Limited, or the name of Brinsmead in connection with the manufacture, sale, or hire of pianos, without adding thereto an express statement that the company were distinct from and had no connection with the old firm of John Brinsmead & Sons, which injunction we upheld. We then pointed out in unmistakable language the fraud which this company was brought into existence to continue to perpetrate; and Sir Robert Reid, who appeared for the appellants, stated that he did not dispute the accuracy of any of the statements we then made; and what we have heard upon this appeal satisfies us that we were unquestionably right in the conclusion at which we then arrived.

But other circumstances have now been brought to light which are very material upon this question of winding-up. We will begin with the date of July 1, 1896, on which day a contract was entered into between Thomas Edward Brinsmead, the father, Edward George Stanley Brinsmead and Sydney Walter Brinsmead, his two sons, of the one part, and Joseph Henry Davies, described as of 28, Finsbury Circus, of the other part, whereby the Brinsmeads agreed to sell to Davies their business of pianoforte makers and all the plant, machinery, and tools belonging to them, in consideration of the sum of 6000*l.*, payable, 1000*l.* in cash and 5000*l.* in shares of the company then about to be brought out under the title of "Thomas Edward Brinsmead & Sons, Limited." The Brinsmeads mentioned in this agreement had, up to October, 1894, when they left, been employed by the old firm of John Brinsmead & Sons at weekly wages. They then set to work to fraudulently represent, as best they could, that the pianos which they made,

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though few in number, were pianos manufactured by the old, well-known firm. The Joseph Henry Davies, of 28, Finsbury Circus, mentioned in this agreement, as it now appears and is not now disputed, is a person of no means whatever, occupying one room in a small house in Clerkenwell at the rent of 5*s.* a week. Upon the next day, July 2, 1896, an agreement in writing was entered into between the above-named Joseph Henry Davies, therein called "the vendor," and Stephenson Wilson, described as trustee for Thomas Edward Brinsmead & Sons, Limited, therein called "the company," whereby Davies agreed to sell to the company all the premises, plant, machinery, and tools, and benefits of contracts and business of Thomas Edward Brinsmead & Sons for the sum of 76,650*l.*, to be paid, as to 66,650*l.*, in cash, and, as to 10,000*l.*, in deferred shares of the proposed company. By clause 7 of this agreement Davies, the vendor, covenanted with Wilson, as trustee for the company, that the dividend for the first three years on the subscribed capital of the company should not be less than 8 per cent. per annum, and, to secure the payment thereof, to lodge with the company (to state it shortly) the sum of 9000*l.*, which was afterwards done by some one, and we shall hereafter see who lodged it. Davies, it will be noticed, was to do all this. Upon what hypothesis the value of the small and comparatively insignificant business and plant of the Brinsmeads could be honestly fixed at the sum of 76,650*l.* we do not know, nor has any endeavour been made by the appellants' counsel at the Bar to shew that it was its honest value, or to explain why it was fixed at this exorbitant sum. It has now been discovered that a company called the Consolidated Contract Corporation were the real promoters of this company (i.e., of Thomas Edward Brinsmead & Sons, Limited), and a strong primâ facie case has been made out that these contracts of July 1 and 2, 1896, were merely devices to cloak the part this corporation, with or without confederates, were taking and about to take in the matter.

Thomas Edward Brinsmead & Sons, Limited, was registered upon July 22, 1896. The next thing which was done was to issue a prospectus. It is evident to us that the directors named

in this prospectus were mere puppets of this Consolidated Contract Corporation, who were working the scheme to bring out the new company to thereby secure to themselves or their nominees what has been called at the Bar the "plunder" to be made thereout. We do not stop to point out in detail the individual personal qualifications of these gentlemen; it is sufficient to say that one was an undischarged bankrupt. The three Brinsmeads were, as one would expect, upon the board, and Dr. Jacob Bradford was also a director and chairman of the board of the new company. He was the principal witness before Vaughan Williams J. in opposition to the winding-up order, and he made an affidavit which was used before the learned judge, in which he swore that he and each of the other directors "had out of their own moneys subscribed and paid for 250*l.* worth of shares in the said company—the directors' qualification." This gentleman, however, has since made a clean breast of it, and has told how it was that the Consolidated Contract Corporation gave him the money to subscribe for shares so as to become qualified as a director, and that he understood the said corporation were the promoters, and he assumed (which we have little doubt is the case) that they would have the bulk of the purchase-money as the promoters. The signed statement of Dr. Bradford made to the official receiver, which counsel for the appellants admitted in evidence and did not seek to contradict, has only to be read to shew that Thomas Edward Brinsmead & Sons, Limited, and its directors were the creatures of the Consolidated Contract Corporation and utilised by them for their own purposes.

Then there is a letter of July 1, 1896, from Thomas Edward Brinsmead, the father, to the Consolidated Contract Corporation which is peculiarly significant upon this point. In the prospectus before mentioned the share capital of the new company is declared to be 100,000*l.*, divided into ordinary and deferred shares of 5*l.* each, and it is stated that the price to be paid for the property of the Brinsmeads had been fixed at 76,650*l.*, leaving 23,350*l.* available for working capital. Here comes out the purpose for which the price of the Brinsmeads' business and plant was fixed at the dishonest sum of 76,650*l.*

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It was to make the public believe that the company was acquiring a property of that value, and that the 76,650*l.* was to be expended in the purchase thereof, the truth being that only 1000*l.* in cash, together with 5000*l.* in shares of the company, was to be paid for the property, and the difference was to go into the coffers of the promoters of the company. Out of this they and not Davies, who had not 1*l.* to put down, might well lodge the 9000*l.* before mentioned. The prospectus stated in leaded type—"The vendor" (that is, Davies of the one room in Clerkenwell at 5*s.* a week rent) "was so satisfied as to the expansion of the business with the additional capital and new works that he guarantees that the dividend shall not be less than 8 per cent. per annum for a minimum period of three years, and will lodge with trustees on behalf of the shareholders, on and before the completion of the purchase, a sufficient amount in cash to secure the due payment thereof." We will not proceed further with the statements in this prospectus, though the truth of many others is impeached. By means of this prospectus 513 persons were induced to become shareholders, subscribing to the amount of 58,325*l.*, of which amount 30,835*l.* has been paid up.

Now, what has become of this 30,835*l.* paid up at different times in the short interval between July 22, 1896, when the company was registered, and December 3, 1896, when it was ordered to be wound up? On August 12, 1896, Richardson brought an action against the company to prevent it from parting with its assets. This was defeated by the company asserting that the contract had already been completed by payment before August 19 to Davies; but if this were so it must have been paid by the authority of the directors, and a more conclusive proof of their subservience to the real promoters could hardly have been forthcoming. Can it be doubted that the money was paid to and received by the Consolidated Contract Corporation or their confederates? This sum, too, was paid before it was due, it not being due by the contract entered into between Davies and the company until September 1, when the purchase was to be completed.

On August 26, 1896, Mr. Richardson, who on July 30, 1896,

had become the holder of twenty-five shares in the company and had paid 125*l.* for them, petitioned the Court to wind up the company. By that time all the subscriptions for shares had disappeared with the exception of the 9000*l.* which has been lodged. Has the bulk of them gone into the coffers of the Consolidated Contract Corporation, and, if so, how did it honestly get there? We have little doubt that upon inquiry this will be found to be the case, and the appellants do not even make a suggestion to whom else it could have gone. Before, however, Mr. Richardson took this step to wind up the company, no less than eighty-six shareholders had brought actions to have their names removed from the register and to have their money returned to them upon the ground that they had been defrauded into becoming shareholders of the company by fraudulent misstatements in the prospectus. Vaughan Williams J., when the petition came before him, not knowing what we know now and legitimately believing the affidavit Dr. Bradford had made, ordered that a meeting of shareholders should take place to ascertain what were the wishes of the shareholders as to whether the company should be wound up or not. This meeting took place upon November 23, 1896, with the Senior Official Receiver, Mr. Barnes, in the chair. Of the 513 shareholders only 36 attended in person and 121 by proxy. Of these the 36 attending in person and 114 by proxy (i.e., 150 in all) voted against the company being wound up, and seven by proxy voted in favour of a winding-up order. How many of the 150 were the nominees of the promoters we have no present means of knowing; certain it is that the promoters had plenty of shares to dispose of. Mr. Barnes with remarkable lucidity laid before those present what he knew of the position of affairs. A discussion then took place, in which Dr. Bradford, now known to have been the tool of the Consolidated Contract Corporation, took a prominent part, and he pointed out to the shareholders present that they had interest upon their shares at 8 per cent. per annum secured to them for the period of three years, and this was true, for it had been secured by the deposit of the 9000*l.*, which was one great lure held out by the promoters to induce would-be shareholders to

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part with their money, without which the scheme could not be carried into effect. We cannot doubt that the Consolidated Contract Corporation were the real providers of this 9000*l.*, though the hand employed may have been the hand of Davies, and, indeed, there was no one else in the transaction but the corporation who had the money with which to do so. At this meeting Mr. Ball, a shareholder, during the discussion significantly stated "that he was thoroughly at a loss to understand where the 9000*l.* had come from," to which Mr. Thomson, the solicitor to the company, made answer "that it was extremely simple, the 9000*l.* was paid by the vendor out of his own pocket to the trustees upon certain trusts." That this is a palpable falsehood is clear. If he had told the truth and stated that the money had been found by the Consolidated Contract Corporation, who had possessed themselves of the bulk of the money subscribed by the shareholders, those who afterwards voted would have been in a very different position when they did so to what they then were. Dr. Bradford also stated that the company had a "good balance" at its bankers, but would not produce the pass-book. The "good balance" now turns out to have been 79*l.*

How can it be said in this case, as it was said in the case of *In re Haven Gold Mining Co.* (1), that the majority of shareholders had waived the fraud and confirmed the transaction? With these statements before them the votes of the thirty-six shareholders who were present in person coupled with the proxies were taken. Such a vote as this, taken under the circumstances it was, and without the true facts of the case being known, can have and ought to have no weight with the Court when considering whether it was just and equitable that the company should be wound up. Such a vote manifestly does not express the real preponderating wish of the majority. If such a wish is in reality expressed, we do not doubt that it takes "a very strong case" to justify the Court taking upon itself to interfere with the domestic forum which has been established for the management of the affairs of the company: *In re Langham Skating Rink Co.* (2) But in the present case,

(1) 20 Ch. D. 151.

(2) 5 Ch. D. 684, 685.

in our judgment, no such wish has been expressed, and, what is more, a very strong case for the interference of the Court has been made out.

When the petition came again before Vaughan Williams J., the learned judge arrived, upon the materials then before him, at the conclusion that the company should be wound up; and as we are agreeing with him, it is not necessary to deal with all the difficulties which the learned judge felt in making the order; but there are two matters to which we wish to allude. We do not agree with the learned judge that it is obvious that Mr. Richardson's petition was presented in the interest of John Brinsmead & Sons, for, if the affidavits of Mr. Richardson, Mr. Maskell, and Mr. Brinsmead had been brought to his attention, which we are told they were not, we do not think that he would have come to this conclusion, although, undoubtedly, there would be a suspicion that it was, unless the matter was explained, as we think it is, by the affidavits above mentioned. We also do not agree with the learned judge that it is shewn that, after the company was restrained by injunction upon August 11, 1896, by North J., there was a valuable business which could be carried on consistently with the injunction; for Mr. Lyttelton Chubb pointed out to us that, although after North J.'s order eighty-nine orders for pianos—so it was stated—were given to the company, yet no less than fifty of these orders were given by a firm trading under the name and style of Edward Mayer & Co. upon one day—namely, October 15, 1896—which certainly requires investigation; and Sir Robert Reid has admitted that, during that period—that is, between August 11, 1896, and December 3, 1896 (four months)—the business was carried on at a loss of at least 700*l.*

It is said that this appeal is brought bonâ fide on behalf of the company and its shareholders. We do not believe it. We have already pointed out the relation of the Consolidated Contract Corporation to the company and its board of directors, who are the persons originally appointed by the promoters. The two shareholders who appear as appellants with the company are Dr. Jacob Bradford and Mr. George Tomlin. Dr. Bradford's position to the Consolidated Contract Corporation

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has been established, as above pointed out; Mr. Tomlin is a shareholder, but he has paid, we are told, nothing upon his shares. On the evidence now before us it is apparent to us that this appeal is really brought on behalf of the Consolidated Contract Corporation to prevent a winding-up order being made, under which the corporation will be forced to hand back what it has dishonestly placed in its coffers, or paid to its confederates, of the moneys subscribed by the shareholders; and, in our judgment, a winding-up order is by far the most effective, if not the only effective, means by which this result for the benefit of the shareholders can be attained. To use the words of Thesiger L.J. in *In re Diamond Fuel Co.* (1), this order of Vaughan Williams J. "may be supported not merely on one isolated fact which may be impeached by the appellants, but by a combination of circumstances which, taken together, make a very strong case in favour of the order."

In our judgment it has been proved that this company—i.e., Thomas Edward Brinsmead & Sons, Limited—was initiated to carry out a fraud, and that, until restrained by injunction, it continued therein; and that a strong primâ facie case has been made out that the Consolidated Contract Corporation are at the present moment dishonestly keeping the shareholders' money to which the shareholders, and not they, are entitled, and are resisting the petition to wind up in order to continue to do so. If the sums which they have improperly obtained from the company can be recovered from them, there will probably be something to distribute among the shareholders, and, although the petitioner is a fully paid-up shareholder, he cannot be said to have no locus standi. The company is hopelessly embarrassed by the actions already brought against it, and there will, no doubt, be many more of the same sort if this petition is dismissed; and if it is not wound up the 35,000*l.* obtained from it by its promoters will remain in their hands.

Although the words "just and equitable" have had a narrow construction put upon them, they have never been construed so narrowly as to exclude such a case as this. If ever there was a case in which it was just and equitable that a company should

(1) 13 Ch. D. 410.

be wound up by the Court, we cannot doubt that that case is this case. For the reasons above, we dismiss this appeal with costs.

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In re THOMAS EDWARD BRINSMEAD & SONS.

Solicitors: *Thomson & Co.; W. Maskell; Pownall & Co.; J. H. Moggridge.*

G. I. F. C.

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Jan. 20, 21, 22, 23, 26.

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[1894 S. 1752.]

Executor—Acceptance of Office—Wilful Default—Delay in proving Will—Loss of Interest.

Executors appointed by a will did not obtain probate of the will for seven years after the testator's death, when probate was granted to one of them alone. The executors could not obtain payment of the money due upon a policy of insurance on the testator's life until the will had been proved, but the money was then paid in full, with interest at the rate of 1 per cent. per annum. Meanwhile, the executors had had to pay out of the estate interest at the rate of 5 per cent. per annum upon a debt of the testator, which was secured by a mortgage of the policy:—

Held, that the executors could not be ordered to account on the footing of wilful default by reason of this loss of interest.

Some years before the will had been proved the executors endeavoured to induce the insurance company to pay the policy money to the mortgagees on account of their debt, and signed a letter addressed to the company authorizing them to do so:

Held, that by so doing the executor who did not prove the will had accepted the office of executor, and could not afterwards renounce probate, and that he was liable to account as an executor for what he had received on behalf of the testator's estate.

Trial of an action for the administration of the real and personal estate of G. C. Stevens, who died on December 23, 1882, having made his will on February 12, 1880.

By his will the testator appointed C. F. Stevens, John Sewell, and M. S. Emerson to be executors and trustees thereof.

Emerson was a solicitor and had been the testator's solicitor. Probate of the will was not granted until October 15, 1889, when it was granted to C. F. Stevens alone. Emerson did not renounce probate, or disclaim the trusts of the will until May 29, 1894, after the commencement of this action, the writ in which was issued on April 30, 1894. Sewell never renounced or disclaimed. Emerson took for some years an active part in relation to the administration of the estate, though he alleged that he had done so only as the solicitor of C. F. Stevens.

The plaintiff was a residuary legatee under the will; the defendants were C. F. Stevens and Emerson. The plaintiff alleged that from the death of the testator both the defendants had acted as executors of the will and administered the estate of the testator, and that Emerson had continuously since the death of the testator intermeddled with his estate and effects, and had received large sums of money forming part of the estate. The plaintiff also alleged that the defendants had been guilty of numerous acts of devastavit and of wilful default in relation to the estate. Several specific acts of wilful default were alleged. The plaintiff claimed to have the real and personal estate of the testator administered by the Court, and to have the accounts taken on the footing of wilful default. Both the defendants denied that Emerson had acted as executor or trustee of the will, and said that, except as solicitor or agent for the defendant Stevens, he had never intermeddled with the testator's estate. Both the defendants denied that they or either of them had been guilty of any act of devastavit or wilful default.

The testator's estate consisted in part of a sum of 676*l.*, payable under a policy upon his life effected with the Scottish Widows' Fund Assurance Society. The policy had been mortgaged by the testator to his bankers, Messrs. Gurneys, and was in their possession at the time of his death. The policy money became payable by the society on March 21, 1883.

On July 25, 1883, Emerson called at the office of the society, with the object of inducing the society to pay the policy money to Messrs. Gurneys in part discharge of their debt, and had an interview with Mr. Day, the secretary of the society. It was then arranged that a letter should be written to the society, signed by all three executors, authorizing the society to pay the policy money to Messrs. Gurneys. In a bill of costs delivered by Emerson to the defendant Stevens, and headed "Re G. C. Stevens, deceased. General costs of Executorship," there was this entry under the date of July 25, 1883: "Attending Secretary of the Scottish Widows' Fund. Conferring as to payment of policy moneys, and arranging for a letter to be signed by the executors, authorizing the company

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to pay the policy moneys over to Messrs. Gurneys & Co. on account of their debt."

A letter addressed to the secretary of the society, and dated July 28, 1883, was accordingly prepared by Emerson, and was signed by all the three executors. The letter was as follows:—

"G. C. Stevens, deceased.

"Please pay the amount due from you to Messrs. Gurneys & Co., Bankers, Norwich, upon their handing you policy and assignment or memorandum of deposit, they being entitled to receive the same."

The word "executors" was not appended to the signatures to the letter.

The bill of costs contained the following entries under the date July 28, 1883.

"Writing letter for your signature, as arranged with the secretary of the Scottish Widows' Fund, authorizing the company to pay to Messrs. Gurney the policy money to which they were entitled.

"Attending Mr. Sewell, explaining to him that he would not be obliged to act further and obtaining his signature thereto.

"Clerk's attendance upon you in Magdalen Street to obtain your signature.

"Writing Messrs. Gurneys & Co. requesting them to apply for payment of policy money."

On July 30, 1883, the secretary of the society wrote the following letter addressed to Emerson:—

"G. C. Stevens, deceased.

"I am in receipt of the letter of the 28th inst., signed by yourself and co-executors. I am doubtful whether the directors will pay the claim before the will is proved, but Messrs. Gurney & Co. had better send the policy and the security which they hold, and, if that should prove sufficient, I will get the matter settled as speedily as possible."

Ultimately the society declined to pay the policy money until the executors had obtained probate of the will. Nothing more was done in relation to the payment of the money until the probate had been obtained on October 15, 1889, shortly after

which the 676*l.* was paid by the society, together with interest thereon at the rate of 1 per cent. per annum from March 21, 1883, to November 21, 1889. Meanwhile the executors had continued to pay interest, at the rate of 5 per cent. per annum, during the same period, upon the debt which was secured by the policy, the difference between the interest thus received and paid amounting to 157*l.* 14*s.* 8*d.* It was alleged by the plaintiff that the omission to get in the policy money was an act of wilful default, and that the defendants ought to be charged with the difference of interest, and that they ought to account as executors upon the footing of wilful default. The plaintiff alleged other instances of wilful default, but it is not necessary for the purpose of this report to state the facts relating to them.

It was alleged by the plaintiff that in the application to the insurance company in 1883 for payment of the policy money the defendant Emerson had acted as executor, and that he could not afterwards renounce the executorship. Other acts of Emerson were relied upon for the same purpose, but it is considered unnecessary to refer to them.

John Sewell never acted as executor, except by signing the letter of July 28, 1883, to the insurance company. But he never formally renounced probate.

Everitt, Q.C., and *J. G. Butcher*, for the plaintiff. (1.) The defendant Emerson has so acted that he must be taken to have accepted the office of executor, and his renunciation and disclaimer are of no avail. He must account as executor. The whole management of the estate was in fact left in his hands. Though he asserts that he was acting only as solicitor to his co-executor Stevens, the true result of the evidence is that he was acting as executor. That which took place with reference to the policy in the Scottish Widows' Fund is conclusive on this point. The part which he took in those transactions could not be properly taken by him except in the character of executor. If a man who has been named as executor in a will does acts which would be rightly done by him, if referable to the position of executor, and which would otherwise be unjustifiable,

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he cannot afterwards renounce probate of the will, and the Court will treat him as having accepted the office, holding his acts sufficient evidence of his intention to accept it. Acts which, if a man had not been named executor, would render him liable as an executor de son tort, will, if he is named executor, be evidence of his acceptance of the office. An executor cannot relieve himself of responsibility by leaving the management of the estate to some one else. An executor cannot renounce after intermeddling with the estate. In such a case his renunciation is invalid: *In the Goods of Badenach* (1); Williams on Executors, 9th ed. pp. 227, 228, 234. Demanding payment of the debts of the deceased would make a man who was not named an executor liable as executor de son tort: Godolphin's Orphan's Legacy, 3rd ed. p. 90; Williams on Executors, 9th ed. p. 209.

(2.) The executors ought to be ordered to account on the footing of wilful default. In order to obtain an account on that footing it is sufficient for the plaintiff to prove one instance of wilful default. The delay in proving the will, the result of which was that the policy money could not be received by the executors, was a wilful default on their part, and the loss of interest—the difference between the 1 per cent. paid by the insurance company and the 5 per cent. which the executors had to pay to the mortgagees—is a loss resulting directly from the delay in proving the will. The executors knew that the insurance company would not pay the policy money without production of the probate, and yet they delayed for seven years in proving the will. This was wilful default on their part. Executors are charged with interest upon money in their hands; if they omit to get in money belonging to the estate they are liable as for wilful default in respect of any loss occasioned to the estate by means of their delay. Even though no part of the debt which they omit to get in is lost, still they are liable for loss of interest. Here the estate had to pay for seven years interest which it would not have had to pay if the executors had got in the policy money. This was a loss directly flowing from the wilful default of the executors. It is the duty of an

(1) (1864) 3 Sw. & Tr. 465.

executor to take the necessary steps to realize the estate: *In re Brogden.* (1)

Swinfen Eady, Q.C., and *Christopher James*, for the defendants. As to some of the instances which are alleged of wilful default there is really no evidence.

As to the policy money. When an account is directed on the footing of wilful default, the executor is ordered to account "for what but for his wilful default he might have received." The 4 per cent. interest which is said to have been lost never became payable to the testator's estate; it never belonged to the estate, but was payable by the estate. The executors could not have received the policy money until they had obtained probate of the will; if, therefore, there was any wilful default, it consisted in not proving the will sooner. That is not wilful default; and, at any rate, the alleged damage is too remote.

An executor who has not proved the will is only liable to account for what he has actually received; he will not be ordered to account on the footing of wilful default: *Lowry* v. *Fulton.* (2) An executor who has not proved does not act as executor by assisting a co-executor who has proved: *Orr* v. *Newton* (3); *In re Gardner* (4); *Stacey* v. *Elph* (5); *Vickers* v. *Bell* (6); *Watkins* v. *Brent.* (7)

[NORTH J. referred to *Cummins* v. *Cummins.* (8)]

If Stevens were dead, Emerson could not be charged as executor until he had proved the will; he cannot now be charged with anything but what he has actually received. And Stevens is not liable on the footing of wilful default in respect of anything which took place before he proved the will.

An executor cannot maintain an action against a creditor of the testator before probate: how can he be guilty of wilful default because he did not bring an action? Creditors are not prejudiced so long as one executor has proved the will. A person who is appointed executor may do many things without

(1) (1888) 38 Ch. D. 546.
(2) (1839) 9 Sim. 115.
(3) (1791) 2 Cox, 274.
(4) (1892) 41 W. R. 203, 204.
(5) (1833) 1 My. & K. 195.
(6) (1864) 4 D. J. & S. 274, 283.
(7) (1835) 1 My. & Cr. 97.
(8) (1845) 3 J. & Lat. 64.

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making himself liable to account as executor: *Orr* v. *Newton*. (1) There is no fixed rule that an executor is wrong in paying a debt which does not carry interest before a debt which does.

Everitt, Q.C., in reply. In *Orr* v. *Newton* (1) it was not suggested that a man who had so acted that he could not renounce probate could not be made liable for his wilful default, and there is no authority for saying that an executor, who has not proved, but has intermeddled with the estate, cannot be made liable for wilful default. The same observation applies to *Lowry* v. *Fulton*. (2) If a person who is named as executor intermeddle with the estate, he will be liable to account as executor though he has not proved the will. *Dove* v. *Everard* (3) only shews that an executor who after he has renounced has in fact acted only as agent of his co-executor cannot be made liable as executor. Here both the defendants knew that the policy money was receivable, and it was wilful neglect on their part not to get it in. This has resulted in a loss to the estate. In *Conyngham* v. *Conyngham* (4) it was held that a trustee, who, with notice of his appointment as such, interfered with the subject-matter of the trust, could not afterwards repudiate the trust and say that he had acted only as an agent. The same principle applies to executors.

NORTH J., after stating some of the facts, continued:—The plaintiff does not accept the disclaimer and renunciation by Emerson on May 29, 1894. The plaintiff alleges that Emerson has acted as executor; that the probate of the will when produced shews that both Stevens and Emerson were appointed executors; that the probate by the one and the acting by the other make them both executors; that the one cannot disclaim because he has proved, and the other cannot disclaim because he has acted. Therefore it is said that they both ought to account as executors. The first question is whether Emerson has acted as executor. [His Lordship referred to the various acts of Emerson which were relied on by the plaintiff as shewing that he had acted as executor, and in particular to what took place.

(1) 2 Cox, 274.
(2) 9 Sim. 115.
(3) (1830) 1 Russ. & My. 231.
(4) (1750) 1 Ves. Sen. 522.

as above stated, in relation to the policy of insurance, and continued :—]

The position of the parties at the time of the application to the insurance company in July, 1883, was this. The executors applied—only an executor could apply—to the insurance company for payment of the money due on the policy. The company might safely have paid the money to the executors, or one of them, and the receipt of one executor would have been a good discharge. The executors, or one executor, could have given a good receipt for the money, although the will had not been proved; and if any question had arisen as to the effect of such a payment, the law is perfectly clear and well settled. I need only refer for this purpose to an authority which cannot be disputed—namely, Williams on Executors, 9th ed. p. 249, where it is said: "The executor, before he proves the will, may do almost all the acts which are incident to his office, except only some of those which relate to suits. Thus he may seize and take into his hands any of the testator's effects, and he may enter peaceably into the house of the heir for that purpose, and to take specialties and other securities for the debts due to the deceased. He may pay, or take releases of, debts owing from the estate; and he may receive or release debts which are owing to it; and distrain for rent due to the testator. . . . And although he should die, after any of these acts done, without proving the will, yet do these acts so done stand firm and good. . . . So, if an executor assents to a legacy, and dies before probate, yet the assent is good enough. So all payments made to him are good, and shall not be defeated, though he dies and never proves the will. In a word, the executor's not proving the will does, upon his death, determine the executorship, but not avoid it. It must, however, be carefully observed in this place, that although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to shew the right to make the assignment or give the assent; which can

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only be effected by producing the probate, or other evidence of the admission of the will in the Court. . . . If the executor died after the assignment or assent, without having obtained probate, letters of administration cum testamento annexo must be produced instead." The letters of administration cum testamento annexo would prove clearly who were named executors in the will, and the acts done by the executor who had not proved would shew his acceptance of the duties of executorship: see *Cummins* v. *Cummins*. (1) Therefore, at the time of which I am now speaking, the society might, if they had chosen, have paid the money to the executors and taken their receipt for it. On the other hand, it is equally clear that, if the society had refused to pay, the executors could not have compelled them to do so without proof of the will by one or more of the executors, or, if they renounced, by a grant of administration cum testamento annexo. Although there are certain acts which an executor may do without probate, and certain cases in which he may take proceedings founded upon his own possession of the property of the testator, yet in the present case the executors could not have obtained judgment for payment of the policy money before probate. Although the insurance company could safely have paid the executors before probate, the executors could not have compelled them to do so.

Then in my opinion the defendant Emerson's bill of costs shews most clearly that what was done by him was done in the character of executor and in no other. It does not follow that because a person who is named as executor has intermeddled with the estate he is necessarily bound to take out probate of the will. Cases have been cited which shew that some acts of dealing with an estate may not have that effect. For instance, if Stevens had proved the will and Emerson had renounced, his acting as solicitor for Stevens to any extent would not have made him an executor. Cases have been cited which shew that, when one executor has proved the will, acts done by another who has not proved to assist the first in the administration may or may not be evidence of acceptance of the office. But, if it is shewn that the act was done by him

(1) 3 J. & Lat. 64.

merely as the agent of the executor who has proved, the agent cannot be made liable as executor, because he acted only as agent and not as executor.

But, in my opinion, none of the cases cited for this purpose apply to the present case. In all those cases there was a principal for whom the alleged agent might have been acting as agent. If Stevens had proved the will and Emerson had not proved, then the principle of those cases might have applied. But there was no principal for whom Emerson could have acted as agent. How can it be truly said that the letter which was signed by the three executors in pursuance of the arrangement with the insurance company was signed by one of them as agent for the other when that other was no more a principal than the alleged agent? If it could be said that Emerson was merely acting as agent for Stevens, it might be said with equal truth that Stevens was acting as agent for Emerson; and although, no doubt, Emerson might have been relieved from liability if, when the facts were disclosed, it had turned out that he had been merely acting as solicitor for a person who was himself acting as executor, that cannot have any application to such a case as the present.

It is clear, therefore, that what was done then was done with the view of giving the executors' consent, in the hope of thereby inducing the insurance company to pay over part of the estate of the deceased to the mortgagees. It could not have been done with any other purpose; and if this authority had been acted upon (as it might have been) by the company, and the money had been paid by the direction of the executors to the mortgagees, or with the consent of the mortgagees to the executors, it could not have been said that there was not a receipt by the executors, and that they would not be liable to account for the money. It seems to me, therefore, that this was clearly an acting by Emerson as executor and in no other character. [His Lordship then referred to two other transactions which had been relied upon as shewing that Emerson had acted as executor, and continued:—]

As regards those two matters, I think they were both acts of acceptance by Emerson, for the reasons which I have given as

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to the policy. It is not necessary to consider those cases further, because, as I have already said, in the case of the policy there seems to me to be a clear acceptance by Emerson of the office of executor. He acted in a way which could not possibly be anything but an acceptance by him of the office of executor.

It follows that I must direct the accounts to be taken against Emerson, as well as against his co-executor Stevens. I may refer to *James* v. *Frearson* (1), in which a bill was filed against an executor seeking to charge him in respect of devastavits committed by his co-executor who had died, and the defendant denied that he had ever acted in the lifetime of the executor, and it was admitted that he had not proved the will until after the death of the co-executor. I refer to that case only for the form of the decree. It directed the "ordinary administration accounts against the two defendants." Certain special inquiries were also directed in that case—very full and special inquiries—by reason of the facts, but they do not throw any light upon the present case.

Mr. Everitt asked that the account might be taken on the footing of wilful default. Such an account is of a totally different character from the ordinary accounts against executors, as has been explained in various cases. I may refer to *Partington* v. *Reynolds* (2), in which Kindersley V.-C. (3) pointed out very clearly the totally different nature of an account on the footing of wilful default and the common account. A wilful default account must be founded upon special evidence proving some cases of wilful default. I say cases, though I think on one occasion Lord Hatherley said that one instance would be enough. But I think that would rather depend upon the kind of instance. Possibly one clear case might be enough; but it is desirable to have more. I am not prepared to say that one instance might not be enough in the present case if it were proved. But a judgment of that kind is a very strong one to make against a defendant, for this reason. Although only one or two cases of wilful default are proved at the trial, a judgment

(1) (1842) 1 Y. & C. Ch. 370. (2) (1858) 4 Drew. 253.
(3) 4 Drew. 255, 256.

on the footing of wilful default applies to all the acts of the executors in winding up the estate, and in taking the accounts they may be charged with wilful default in respect of matters as to which not a word was said at the trial. It is therefore an order of a very wide character, and differs entirely from a special inquiry with respect to some particular matter. I can quite understand that, if one or two cases of wilful default were put forward, the Court might say that they were not sufficient to justify a general account based upon wilful default, but that they were sufficient to justify the directing of special inquiries with regard to the particular transactions in question; and then, if the Court directed inquiries large enough to bring out all the facts, I take it there might be a judgment upon the footing of wilful default as the result of those particular inquiries. But that is a totally different thing from a judgment based upon wilful default proved at the trial and an account directed generally on that footing.

Now, in the present case, what are the acts of wilful default suggested? [His Lordship referred to two alleged instances of wilful default, which he held had not been proved, and which for the purpose of this report it is unnecessary to state, and continued:—]

Then it is said there was wilful default by the executors in their not getting in the money due upon the policy. By reason of that default, however, no loss has accrued to the testator's estate. But it is said that, although there was no default which resulted in any loss of the policy money, there was a breach of trust in not getting in the money sooner, because, if it had been got in, it might either have been applied in paying debts which carried interest, or have been itself invested at interest. There does not appear to me to have been any wilful default in not getting in the policy money, although there may have been some neglect of duty in not receiving it and investing it, or applying it in payment of debts.

It is said that there was wilful default in allowing the will to remain unproved for so many years; but it is impossible to say that the loss of interest on the policy money was sustained by reason of wilful default in not proving the will. The damage

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is too remote. I do not see how executors can be held liable for damage occasioned by their default in not proving the will.

Under these circumstances no case has been made out for directing accounts on the footing of wilful default.

I dismiss the action so far as it seeks relief on that footing. I direct the ordinary accounts against both defendants.

Solicitors: *S. S. Seal, for F. T. Steavenson, Darlington; Whites & Co., for M. S. Emerson, Norwich.*

W. L. C.

NORTH J. 1897 *Feb.* 9, 10.

NICHOLSON *v.* RHODESIA TRADING COMPANY.

[1897 N. 173.]

Company—Articles—Construction—Annual General Meeting—Dividend—Accounts.

The articles of a company provided for the submission of accounts up to a date within three months and reports thereon, the sanction of a dividend, and the transaction of the ordinary business at the annual general meeting:—

Held, that a final dividend could not be sanctioned except at an annual general meeting at which accounts up to the prescribed date and reports thereon were submitted.

THE plaintiff was Robert Nicholson, a signatory to the memorandum of association of the defendant company in respect of one share. He was also allottee of 2000 shares. The directors of the company had passed resolutions forfeiting his shares on the ground of non-payment of calls. Litigation took place between the plaintiff and company in respect of a money claim by the plaintiff and the forfeiture of his shares. This litigation and litigation between the company and others was compromised on terms (inter alia) that Robert Nicholson was to have 2000 fully paid shares, "to be issued now as new shares." The forfeiture of his 2000 allotted shares was to be valid, and the forfeiture of his signatory share was to be annulled and the share issued fully paid.

The defendants, who are called in this report the company,

were a company incorporated by registration on April 15, 1895, as a company limited by shares, with a capital divided into 1*l.* shares, for the purpose of trading in Rhodesia.

The following are the material articles of association of the company:—

"63. The first general meeting shall be held at such time, not being more than four months after the registration of the company, and at such place as the directors may determine.

"64. Subsequent general meetings shall be held once in each year in the month of July or August, at such time and place as may be determined by the directors.

"65. The above-mentioned general meetings shall be called ordinary meetings. All other general meetings shall be called extraordinary."

"71. The business of an ordinary meeting shall be to receive and consider the accounts, balance-sheets, and the reports of the directors and auditors, to elect directors in place of those retiring, to fill vacancies, to elect auditors, and to sanction a dividend. All other business transacted at an ordinary meeting, and all business transacted at an extraordinary meeting, shall be deemed special.

"72. No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business; and such quorum shall consist of not less than five members personally present, and holding or representing by proxy not less than one-tenth of the issued capital of the company."

"134. The directors shall lay before the company in general meeting a recommendation as to the amount which they consider ought to be paid by way of dividend, and the company shall declare the dividend to be paid, but such dividend shall not exceed the amount recommended by the directors."

"136. The directors may from time to time pay to the members such interim dividend as appears to the directors to be justified by the profits of the company."

"145. At the ordinary general meeting in every year the directors shall lay before the company a statement of the

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income and expenditure for the past year, made up to a date not more than three months before such meeting.

"146. The statement so made shall shew, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenditure of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure, which may in fairness be distributed over several years, has been incurred in any one year, the whole amount of such item shall be stated, with a statement of what portion of such expenditure is charged against the income of the year.

"147. A balance-sheet shall be laid before the company at the ordinary general meeting in every year, and such balance-sheet shall contain a summary of the property and liabilities of the company, and shall be accompanied by a report of the directors upon the general state of the company, and a recommendation as to the amount (if any) which the directors consider ought to be paid by way of dividend, and as to the amount (if any) which they propose to set aside as a reserve fund."

"160. The auditors shall at the general meeting at which the balance-sheet and statement are submitted make a report to the company thereon."

The second annual general meeting of the company was held on August 21, 1896. At that time, owing to the disturbed state of Rhodesia, where the company's business was carried on, accounts of the trading of the company had not been received, and the only accounts submitted to the meeting related to transactions in this country, and were not audited. The directors of the company had issued a report to the shareholders, and, by a notice indorsed on the report, called an extraordinary general meeting of the company for February 11, 1897, for the following purposes: "(1.) To receive and consider the annual statement of accounts and balance-sheet, and the

reports of the directors and auditors thereon; (2.) to sanction the declaration of a dividend; (3.) to consider, and if thought fit to pass, a resolution altering the articles of association of the company so as to have the annual general meeting held in January or February instead of July or August in each year."

The report contained a profit and loss account made up to August 31, 1896, and a balance-sheet as of that date duly audited. The account shewed a large profit. The plaintiff claimed an injunction to restrain the company from sanctioning a dividend in accordance with the articles of association on or before July, 1897, and to restrain the alteration of the articles before the issue of the plaintiff's 2000 shares.

A motion was now made on the part of the plaintiff for an interim injunction in terms of the claim.

At the Bar plaintiff's counsel did not ask for an injunction to restrain passing resolutions to alter the articles.

Levett, Q.C., and *Rowlatt*, for the plaintiff. It would be inequitable to allow a dividend to be paid in which the plaintiff did not participate; the effect of a dividend being declared before he gets his shares issued to him might prejudice him.

It is not competent for the company to sanction a dividend except at the ordinary general meeting of the company, which must be held, under the articles as they now stand, in July or August; moreover, the dividend can only be sanctioned when accounts duly audited up to a date not more than three months before the meeting are submitted: on that ground the plaintiff is entitled to an injunction.

Ritter, for the defendant company. The plaintiff will not be prejudiced by the immediate payment of a dividend; if he is entitled to participate, he will get his share. It is only right that the existing shareholders should get the benefit of the large profits that were earned last year. It is intended to raise fresh capital: this can be raised more advantageously to the present shareholders if the intended dividend is declared.

The sanction of a dividend for a past period is under the peculiar circumstances special business, and therefore can be passed at an extraordinary meeting. The formalities required

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by the articles have been complied with as far as possible, and have in spirit been completely complied with. The accounts have been furnished, not up to within three months of the day, but within three months of the date at which the dividend would have been declared had the accounts then been to hand. The provision of the articles as to this will be considered directory.

Levett, Q.C., in reply.

NORTH J. (after stating the facts and saying that an injunction was not now asked for at the Bar in respect of the proposed alteration in the articles). There remains the question whether the plaintiff is entitled to an injunction to restrain the company from sanctioning payment of any dividend. That is put on two grounds: first, it is said that the dividend is proposed to cut him out from participating in it. I do not see that the declaration of a dividend is addressed to that purpose. There are passages in the report of the directors which shew that there may be a good reason why they desire to declare a dividend: they recommend that there shall shortly be a large issue of further capital. They have reason to think that it will be for the benefit of the existing shareholders that the dividend should be paid before the issue of new shares. The plaintiff is entitled to 2000 paid-up shares to be issued now, and the issue to him is only going to be postponed because certain formalities have to be gone through, which take time, before the shares can be legally issued to him as paid up. That is no reason why he should stop the declaration of a dividend which the other members would receive at once.

The question comes, therefore, to this: Is what the directors are proposing to do in accordance with the articles of association? I think it is not. [His Lordship read the articles set out above, and proceeded:—]

In my opinion, on the construction of those articles, a dividend is to be sanctioned only at the annual ordinary general meeting of the company to be held in July or August, when the accounts up to a period within three months of the meeting and other full information have to be submitted to the share-

holders: and they are to have the opportunity, among other things, of fully considering the expenditure and the income of the company. If the directors could obtain the sanction of a dividend in the way proposed, without submitting the accounts required by the articles, by calling an extraordinary meeting, it would be giving the go-by to the provisions made for the protection of the shareholders. I am of opinion, therefore, that a dividend cannot be sanctioned at an extraordinary meeting: and that, even if it could be sanctioned, it would be necessary to follow the requirements of the articles, and lay before the company the matters required to be so laid before them by the articles. In the present case they cannot do this, because the accounts are brought down only to August last, which is much more than three months ago. The directors are not to blame for not having had the accounts ready at the proper time; but in fact the articles have not been complied with. I think the proper course to pursue will be to preface the order with a declaration that the proposed sanction of a dividend at the coming extraordinary meeting is not in accordance with the articles of association, and to restrain the company from declaring or sanctioning a dividend except in accordance with the articles.

Solicitors for plaintiff: *Torr & Co.*
Solicitor for the company: *H. Roger Sadd*

D. P.

STIRLING J.

1897

Jan. 19, 20, 21, 26, 27; *Feb.* 18.

DALTON *v.* FITZGERALD.

[1894 D. 1168.]

Estoppel—Settlement of Land by Grantor having no Title—Entry of Tenant for Life under the Settlement and Acquisition of Possessory Title—Rights of Remaindermen—Statutes of Limitations.

Where a grantor who has no title purports to grant a particular piece of land by deed to A. for life with remainders over, and A. enters under the deed and acquires a good title by possession against the true owner, A. is estopped as against the remaindermen from disputing the validity of the deed.

The principle of *Hawksbee* v. *Hawksbee*, (1853) 11 Hare, 230, and *Board* v. *Board*, (1873) L. R. 9 Q. B. 48, applied.

Paine v. *Jones*, (1874) L. R. 18 Eq. 320, and *In re Stringer's Estate*, (1877) 6 Ch. D. 1, explained and distinguished.

THIS was an action to establish the plaintiff's title to certain lands and hereditaments situate in the township of Bulk, in the county of Lancaster, which formerly formed part of the Bulk estate of Mr. John Dalton, who died on March 10, 1837. Mr. Dalton was, at the time of making his will and codicils hereafter stated and at the date of his death, entitled to real estate of very considerable value, and in particular to (1.) the manor of Thurnham and divers lands and hereditaments in Thurnham, Glasson, Cockerham, Pilling, and Ellel, in Lancaster, hereinafter called the Thurnham estate; and (2.) the manor of Bulk and divers lands and hereditaments in the township of Bulk, hereinafter called the Bulk estate. Both these estates were old family estates acquired by an ancestor of John Dalton in the reign of William and Mary. Mr. Dalton had issue several daughters and one son, who bore the same name as himself. This son in 1809 married Miss Mary Ann Cary, and in contemplation of the marriage a settlement was made by deeds of lease and release dated January 30 and 31, 1809, whereby the Thurnham estate (but not the Bulk estate) was limited to uses which were in substance in favour of John Dalton, the father, for life, with remainder to John Dalton, the son, for life, with

remainder to the first and other sons of John Dalton, the son, successively in tail male, with an ultimate remainder in favour of the right heirs of John Dalton, the father, subject, however, to a jointure in favour of the widow of John Dalton, the son, and to a power to charge the estate for the benefit of his younger children. John Dalton, the son, died in 1819 without having had any children, and consequently the limitations contained in the marriage settlement subsequent to the life of John Dalton, the father, with the exception of the ultimate remainder to his right heirs, failed, and the only effect of this settlement was to provide a jointure for the widow of the son. In this state of things John Dalton, the father, made his will, dated January 25, 1828.

At that time the only children of the testator living were two daughters—Lucy, the wife of Joseph Bushell, and Elizabeth Dalton, who was unmarried. The will contained a recital of the settlement of 1809, commencing as follows: "Whereas by the said settlement my family estates, consisting of the manors of Thurnham and Glasson and of Bulk"—and so forth—"were settled." That was erroneous in so far as it mentioned the manor of Bulk, because the manor of Bulk was not included in the settlement of 1809. The will then proceeded as follows: "And whereas my said son some time ago departed this life leaving no issue of the said marriage and I am desirous that the said estates which have descended to me from my ancestors should be preserved as one entire patrimony and should be enjoyed by my two daughters equally between them for life, and by the survivor of them for her life, and their respective issue male as hereinafter mentioned, and that in default of such issue male the same estates should still be kept undivided and be enjoyed in the order of succession hereinafter pointed out, so that they may always form the estate of one person bearing my name and arms in order to continue the name and memory of my family for many years, if it shall so please God, for these reasons I give and devise all those the manors and lordships of Thurnham and Glasson and of Bulk and all other the messuages, tenements, lands, tythes, fisheries, hereditaments and premises whatsoever situate in Thurnham, Glasson, Bulk,

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Cockerham, Pilling, and Ellel in the county of Lancaster or elsewhere soever, and which are comprised in the settlement so made previous to the marriage of my said late son or mentioned, or intended so to be, with the appurtenances unto and to the use of" two trustees, their heirs and assigns, upon trust to settle, convey and assure the same manors, messuages, lands, tenements, hereditaments and premises to the uses and in the manner therein mentioned.

The testator then defined the limitations upon which his estates were to be settled, and directed his trustees to insert in the settlement all proper and usual clauses for effectuating his intention as counsel should advise; and he also gave special directions as to the insertion of certain usual powers, which he enumerated, including powers of jointuring and charging portions.

The testator made several codicils to his will, in which he referred to the estates devised by his will as "my family estates," "my real estate," "the remainder of my real estate," "my residuary real estates," and "my manors or lordships and estates at Thurnham and Glasson and Bulk."

At the date of the testator's death in 1837 his two daughters named in the will were his co-heiresses-at-law.

By an indenture of settlement dated July 30, 1842, which purported to be a settlement in pursuance of the will and codicils of the testator, after reciting the settlement of 1809 and the will and codicils, it was witnessed that, "for effecting the settlement directed to be made by the said John Dalton the elder as aforesaid," the trustees, with the privity of (among others) Mrs. Bushell and Miss Elizabeth Dalton, bargained, sold, and released unto Richard Gillow, his heirs and assigns, the Thurnham estate and the manor of Bulk, "and all and singular the messuages, mills, lands, tenements, and hereditaments late of John Dalton the elder, situate, lying, and being in Bulk aforesaid" (the same being more particularly described in a schedule thereto), to uses in favour of the testator's daughters and their issue, with remainder to the use of Sir James Fitzgerald (then an infant) for his life, with remainder to his first and other sons successively in tail male, with

remainder to Gerald Fitzgerald (then an infant) for life, with remainder to his first and other sons successively in tail male, with remainder (after certain remainders which failed) to the plaintiff for life, with divers remainders over.

The uses and limitations in the settlement followed the directions of the testator, subject to the question whether or not the lands in Bulk passed under his testamentary dispositions.

The testator's daughters were made parties to the deed and executed it; but the deed was never acknowledged by Mrs. Bushell, and neither Mrs. Bushell nor Miss Dalton purported to grant the property comprised therein. The other tenants for life were named as parties to the deed, but neither Sir James Fitzgerald nor Gerald Fitzgerald ever executed it.

Mrs. Bushell died in 1843 without having had issue and intestate, and her sister Elizabeth was her heiress-at-law, and became, by the death of Mrs. Bushell, sole heiress-at-law of the testator. Elizabeth Dalton died in 1861 without having been married; and thereupon Sir James Fitzgerald entered into possession and receipt of the rents and profits of all the estates comprised in the settlement of 1842. He died without issue in 1867. Thereupon Sir Gerald Fitzgerald entered into possession and receipt of the rents and profits of the same estates. He died on February 22, 1894, without issue; and thereupon the plaintiff became entitled, according to the limitations of the settlement of 1842, to possession of the estates therein comprised. It was discovered, however, on Sir Gerald Fitzgerald's death, that in January, 1894, he had procured himself to be registered in the land registry as proprietor of the fee simple of certain of the lands in Bulk comprised in the settlement, and had by a codicil to his will devised those lands to the defendants. Thereupon the defendants entered into possession, and the present action was brought, claiming (inter alia) a declaration that the lands in question were effectually comprised in the settlement of 1842; that the title of the plaintiff as tenant for life of the lands under the settlement might be established, delivery of possession of the lands to the plaintiff, and an order for the rectification of the register of title at the office of the

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land registry. The defendants asserted that John Dalton the father died intestate as to all lands in Bulk except such as were included in the settlement of 1809; that the manor of Bulk was only a reputed manor, that the devise of that manor would not pass the lands in question, and that the testator had not by his will and codicils used any language adequate to pass them; that the settlement of 1842 was altogether ineffectual, and that Sir Gerald Fitzgerald by his possession of these lands for more than twenty years had acquired a title to them in fee simple. The plaintiff, on the other hand, asserted that the manor of Bulk was an actual and not a reputed manor, and that a devise of the manor was effectual to pass the lands in question; that if not, still, on the true construction of the will, these lands were comprised in the devise to the trustees therein contained; and, finally, that even if all these points were decided against the plaintiff, Sir Gerald Fitzgerald and the defendants who claimed under him were estopped from disputing the validity of the settlement of 1842; and for this purpose evidence was adduced to shew that prior to January, 1894, Sir Gerald Fitzgerald had treated the lands in Bulk now in question as having been properly settled by the settlement of 1842. For example, the succession duty account which he passed on succeeding to the family estates was rendered as an account on the succession of real estate derived from John Dalton, Esq., the predecessor, under the will of the said John Dalton, and under a settlement made in pursuance of the will of the said John Dalton, dated July 30, 1842, and included the lands in Bulk; and by an indenture of September 9, 1868, which commenced by reciting the settlement of 1842, and expressly recited that the lands in Bulk were thereby settled to certain uses, which were there set out, with certain powers of jointuring and charging portions, he, in the exercise of the powers conferred by the thereinbefore recited indenture, charged the settled estates with a jointure for his widow and portions for his younger children.

Inasmuch as the question of estoppel would, if decided in favour of the plaintiff, dispose of the whole case, that point was argued first.

Hastings, Q.C., and *J. T. Prior*, for the plaintiff. 1. Elizabeth Dalton, by executing the settlement of 1842 and concurring in its provisions, is estopped from setting up any title to the lands in question inconsistent with that settlement.

2. Sir Gerald Fitzgerald, having entered under that settlement, cannot by acquiring a good title under the Statute of Limitations against the true owner defeat the title of the remaindermen under the settlement. Where a person enters upon an estate under an instrument whereby a specific disposition of the estate is made in his favour, he is estopped from denying the validity of the instrument, and cannot set up a claim adverse to the persons entitled under the subsequent dispositions thereof: *Hawksbee* v. *Hawksbee* (1); *Board* v. *Board*. (2)

In both those cases the question arose under a will, but for the purpose of the present argument there is no distinction between a will and a deed.

[STIRLING J. referred to *Kernaghan* v. *M'Nally* (3) and *Paine* v. *Jones*. (4)]

Paine v. *Jones* (4) is distinguishable, because there the will which it was said the defendant was estopped from impeaching contained no specific disposition of the property then in dispute. *In re Stringer's Estate* (5) is another case of that kind.

Elton, Q.C., *Buckley, Q.C.*, and *Carson*, for the defendants. On no principle can the lands in question be treated as falling within the settlement of 1842. That deed was executed for the express purpose of giving effect to the provisions of the will of John Dalton; it conferred no beneficial interest on anybody beyond what the will gave; it recited the settlement of 1809 and the will of John Dalton; it was therefore apparent on the face of the deed itself that the testator had made a mistake. But it is said that, because Elizabeth Dalton and Sir Gerald Fitzgerald did certain acts under the impression that they were tenants for life under the settlement of the lands in question, they are estopped from setting up their true title. On

(1) 11 Hare, 230.
(2) L. R. 9 Q. B. 48.
(3) (1861) 12 Ir. Ch. Rep. 89.
(4) L. R. 18 Eq. 320.
(5) 6 Ch. D. 1.

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the death of the testator, Elizabeth and Lucy became entitled as his co-heiresses to the property in question. The execution of the deed by Lucy, who was a married woman, could have no effect because it was never acknowledged, and the execution by Elizabeth could at the most affect her moiety only. It must be shewn that she disposed of her interest by the deed of 1842, either by grant or by estoppel. She did not purport to grant the lands, and therefore there can be no question of any grant; but she intended the trustees to grant them in ignorance of her rights. Under these circumstances her execution of the deed did not operate as an estoppel, and her privity and consent effected nothing: *Carpenter* v. *Buller* (1); Shelford's Real Property Statutes, 9th ed. p. 258. Nor is Sir Gerald Fitzgerald estopped, for he did not execute the deed and he took no benefit under it.

The authorities divide themselves into two classes—first, cases where a testator has no title but makes an effective devise, assuming the title to be good, such as *Board* v. *Board* (2) and *Hawksbee* v. *Hawksbee* (3); and, secondly, cases where the testator has a good title but does not make an effective devise, such as *Paine* v. *Jones* (4) and *In re Stringer's Estate.* (5) In the latter class of cases a person who enters under the impression that he is taking under the will is not estopped thereby from setting up a title against the remaindermen. The deed of 1842 was not intended to confer any title apart from the will, and the parties must be treated as deriving their title from the will. This case, therefore, falls within the second category. In *Paine* v. *Jones* (4), which is a direct decision in our favour, Malins V.-C. distinguishes *Board* v. *Board* (2), *Hawksbee* v. *Hawksbee* (3), and *Anstee* v. *Nelms.* (6)

[STIRLING J. That case contains a strong expression of opinion against your contention. It is cited without objection in Sudgen's Real Property Statutes, 2nd ed. p. 65, s. 97.]

There is no decision of any English Court opposed to *Paine* v. *Jones* (4); and that a tenant for life is not a trustee for the

(1) (1841) 8 M. & W. 209, 212.
(2) L. R. 9 Q. B. 48.
(3) 11 Hare, 230.
(4) L. R. 18 Eq. 320.
(5) 6 Ch. D. 1.
(6) (1856) 1 H. & N. 225.

remaindermen is shewn by *Dicconson* v. *Talbot*. (1) *Kernaghan* v. *M'Nally* (2) is not binding on this Court, and is distinguishable.

Hastings, *Q.C.*, in reply.

STIRLING J. intimated that he would give notice to the parties if he required any further argument.

Feb. 18. STIRLING J., after stating the facts substantially as above set out, continued as follows:—For the purpose of the present judgment I assume in favour of the defendants that on the true construction of the will and codicils of John Dalton, the father, the lands and hereditaments in Bulk, to which I shall hereafter refer as the lands in Bulk, which are now claimed by the defendants, did not pass by his will and codicils, but on the death of the testator devolved to his co-heiresses-at-law. By the deed of July 30, 1842, to which those co-heiresses were parties, the trustees of the will with their privity purported to bargain, sell, or release these lands in Bulk by a sufficient description to legal uses in favour of the same persons as would have been entitled to have legal uses created in their favour if these lands in Bulk had passed by the will and codicils of John Dalton. Now of this deed Sir Gerald Fitzgerald took the benefit in respect of these very lands in Bulk. This appears to me to be established, first, by the succession duty account passed by him, and, secondly, by the jointure deed executed by him, and dated September 9, 1868. [His Lordship referred to those documents, and continued:—]

Upon this evidence I come to the conclusion of fact that Sir Gerald Fitzgerald entered into possession of the lands in Bulk under the settlement of 1842. The question is whether, having so done, he is not estopped from denying the validity of that deed.

Similar questions have repeatedly arisen under wills. Those cases appear to divide themselves into two classes. The first is, where a testator having either no title or an imperfect title to land devises it by specific description to or upon trust for a

(1) (1870) L. R. 6 Ch. 32. (2) 12 Ir. Ch. Rep. 89.

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person for life with remainders over. Examples of this class are to be found in *Hawksbee* v. *Hawksbee* (1) and *Board* v. *Board*. (2) I refer particularly to the latter case, as the judgment is more elaborate and expresses the grounds of decision more fully than in *Hawksbee* v. *Hawksbee*. (1) In *Board* v. *Board* (2) the testator was simply tenant by the curtesy of certain premises. He devised them to trustees for his daughter Rebecca for life, with remainder to his grandson William. Then, upon the testator's death, Rebecca entered into possession of the property, and paid the annuities charged upon the land, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. Then William conveyed his remainder to the plaintiff. Rebecca, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon his death, took possession. The plaintiff, the assignee of William, the remainderman, having brought ejectment, it was held that, Rebecca having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover. In giving judgment Blackburn J. says (3): "The case is like that of a tenant coming in under a landlord: he is estopped from denying his landlord's title. As to the point that Robert, being only a tenant by the curtesy, had nothing to devise, it may be said that in many instances the landlord has only an equitable title, and yet the tenant is estopped from disputing such title. I think if the law were otherwise the consequences would be disastrous, for how unjust it would be if a person who comes in under a will as tenant for life, and continues in possession until twenty years have elapsed, could say there was a latent defect in the title of his predecessor, and the estate devised really belonged to the heir-at-law, and his title being barred, he, the tenant for life, is entitled to the property in fee simple. It is contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a devisor should say that such title is defective. My

(1) 11 Hare, 230. (2) L. R. 9 Q. B. 48.
(3) L. R. 9 Q. B. 53.

brother Martin, in *Anstee* v. *Nelms* (1), says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful, so as to give to his heir a right against a remainderman. That seems directly in point. It is good sense and good law. All we have to decide here is that Rebecca, having entered under the will, William, the remainderman under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid." Mellor J. says: "A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will." Quain J. says: "I decide this case on the simple point that a person who takes under a will, and acts on the will in paying the legacies and annuities given under it, cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will."

No doubt has ever been thrown upon that class of cases; but there is a second class as to which there is a conflict of opinion, namely, where a testator, having a good title to property, has not effectually devised it, and the tenant for life of the property effectually devised by the will has entered, just as if it had been included in a valid devise, and acquired by possession a title against the heir. The case which has most frequently happened is under the law as it stood prior to the Wills Act, when a testator was incompetent to devise land acquired subsequently to his will. Of this class of cases *Paine* v. *Jones* (2) is a leading example. There a testator by his will, dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property as well as the devised

(1) 1 H. & N. 232; 26 L. J. (Ex.) 8. (2) L. R. 18 Eq. 320.

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estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value. It was held, upon a bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed. Malins V.-C., who decided the case, goes through all the prior cases, including *Board* v. *Board* (1) and *Hawksbee* v. *Hawksbee* (2), and he expresses his concurrence with those cases, but he distinguishes them. Referring to them, he says (3): "All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. The defendants had a title under the will." That is apparently a misprint for "widow." The Vice-Chancellor then goes on: "I think this is a distinct case of adverse possession, and the defendants claiming under the widow have acquired a title as against those persons whose title is only under the will." In a subsequent case of *In re Stringer's Estate* (4), Sir George Jessel held that if a testator made an invalid devise of property, to which he himself had a good title, to A. for life with remainders over, and A. acquired a good title by possession against the heir-at-law, A. was not estopped from saying, as against the remainderman, that the devise was invalid. Upon appeal the devise which the late Master of the Rolls had held to be invalid was held to be valid, and no opinion was expressed on the decision of the Master of the Rolls on the point in question; but it appears to me that when his judgment is examined the Master of the Rolls did not intend to throw any doubt upon the class of cases of which *Board* v. *Board* (1) is an example. At page 10 of the report he says: "A man is in possession of land with a defective title, but he has possession. In fact, under the old law, he could not have devised without, except in the case of certain reversions. He devises to a man for life

(1) L. R. 9 Q. B. 48.
(2) 11 Hare, 230.
(3) L. R. 18 Eq. 328.
(4) 6 Ch. D. 1.

with remainder over. The devisee, having no title except under the will, enters under the will. It has been held that he cannot deny that the testator had a right to devise in the way he has devised; that is, that the testator had a sufficient title to support the devise as far as the devisee is concerned—not to make the devises valid which were invalid, because the devises were invalid per se if the testator had insufficient title. Therefore the whole of the estoppel is this: you have entered under the will of a man who had possession as far as you are concerned: possession is the fee: you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee, though you may have found out afterwards that he was only tenant for years, or tenant from year to year, or tenant for life, or anything else. You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle." On the other hand, in *Anstee* v. *Nelms* (1), Pollock C.B. and Martin B. appear to have been of opinion that the principle laid down in *Board* v. *Board* (2) was applicable to a case similar to that of *Paine* v. *Jones* (3); and in the case of *Kernaghan* v. *M'Nally* (4) the Lord Chancellor and the Court of Appeal in Ireland appear to have given a decision which was not in accordance with that of Malins V.-C.

It is contended that the present case is governed by the decisions in *Paine* v. *Jones* (3) and *In re Stringer's Estate.* (5) In my judgment that is not so. The question is not whether Sir Gerald Fitzgerald is estopped from denying that John Dalton devised the lands in Bulk, but whether he is estopped from denying the validity of the settlement of July 30, 1842. It appears to me that the reasoning in *Board* v. *Board* (2) applies with as much force to a deed as to a will, and I see no reason why, if a grantor who has no title or an imperfect

(1) 1 H. & N. 230, 232.
(2) L. R. 9 Q. B. 48.
(3) L. R. 18 Eq. 320.
(4) 12 Ir. Ch. Rep. 89.
(5) 6 Ch. D. 1.

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title to a particular piece of land purports to grant it by deed to A. for life with remainders over, and A. enters under the deed and acquires a good title against the true owner, he should not be held to be estopped as against those in remainder from disputing the validity of the deed. It is to be observed that in this case the true owners were parties to and executed the deed, and though they did not grant, or purport to grant, the lands in Bulk, still they, by executing the deed, assented to the act of the trustees, and shewed that they treated the deed as a proper settlement in pursuance of the directions in the testator's will. It was said, however, that there could be no estoppel, as the truth appeared on the face of the settlement of July 30, 1842. But, in my judgment, it does not appear on the face of that deed either that the manor of Bulk was only a reputed manor, so that the lands in Bulk belonging to the testator did not pass under a devise of that manor, or that upon the true construction of the testator's will there was an intestacy as regards the lands in Bulk. It is also urged that the settlement of July 30, 1842, was only machinery for giving effect to the dispositions made by the testator, and gave no further or better title than the will itself. This seems to me to give too little weight to the deed, which confers a legal title on the beneficiaries under the will, and defines many rights conferred upon them by the will and codicils (as, for example, that of creating jointures and charging portions for younger children), of which the beneficiaries have availed themselves. The conclusion, therefore, to which I come is that the doctrine of estoppel applies to this case, and that the defendants are precluded from denying that the deed of 1842 was an effectual settlement, and consequently that the plaintiff is entitled to judgment.

Solicitors: *H. B. Bell; Carlisle, Unna, Rider & Heaton.*

H. B. H.

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1897
March 3, 4.

In re DE LINDEN.
In re SPURRIER'S SETTLEMENT.
DE HAYN *v.* GARLAND.

[1895 D. 341.]

Lunatic—Payment out—Foreign Subject—Lunatic Ward of Foreign Court entitled to Fund in Court in this Country—Jurisdiction.

An application was made by a lady who had been found a lunatic by the Royal Bavarian Court, and had been made a ward of that Court on that ground, by her next friend, who was a judge of that Court, that a fund standing to her credit in the Chancery Division and representing the share to which she was entitled under her parents' marriage settlement might be paid out to the deposit commission of the Bavarian Court. The deposit commission (which consisted of the above-mentioned judge and another official) was attached to the Court for the purpose of taking charge of the funds of its wards and of giving receipts for the same. The lunatic was the daughter of a German father and an English mother, and she and her nearest living relatives were domiciled German subjects:—

Held, that the Court had jurisdiction to make an order for payment out of the fund, and that the order ought to be made.

In re Barlow's Will, (1887) 36 Ch. D. 287, distinguished.

THIS was an application on behalf of Baroness Virginie Aloyse Ernestine de Linden, of Baldingen, near Nördlingen, in the Kingdom of Bavaria, spinster, a person of unsound mind and a ward of the Royal Bavarian Court of Justice, Nördlingen, by Hans Schütz, Royal Bavarian judge, her next friend, that a sum of 7399*l.* 7*s.*, standing in court to her credit and representing the share to which she was entitled under the marriage settlement of her parents, might be sold, and that the proceeds, after providing for the costs of this application, might be paid to Hans Schütz and Zacharias Hoenning jointly as members of the deposit commission of the Royal Bavarian Court, to the intent that the same might be disposed of according to Bavarian law.

In 1834 a marriage took place between Baron Ernst de Linden, a German, and Miss Amey Anne Spurrier, an Englishwoman, and upon the occasion of the marriage an English settlement was executed of the lady's fortune, whereby certain funds were settled after the death of the parents in trust for

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the children of the marriage absolutely. There were several children of this marriage, of whom the applicant was one. The applicant was born in Germany, and she and all her brothers and sisters were domiciled German subjects. In 1894 a judicial inquiry was held at Nördlingen as to the state of the applicant's mind, and upon that inquiry the chief judge of the Royal Bavarian Court, Nördlingen, adjudged that the applicant was of unsound mind, and made her a ward of the Court on that ground. In 1895, after the death of the surviving parent, a petition was presented by the children for the distribution of the settled funds which had been paid into court under the Trustee Relief Act, 1847, and upon that occasion the share of the present applicant was carried to a separate account by reason of her being a person of unsound mind and a ward of the Bavarian Court.

It appeared from an affidavit of Gottfried Böhm, a "councillor of law of Bavaria," filed in support of the present application that, according to Bavarian law, the Court of justice as Court of trusteeship was entitled to accept and receive the moneys of wards, and that the receipt, custody, and granting of receipts for such moneys appertained to the deposit commission of the Court; and, further, that the deposit commission consisted of two members, who at the present time were Hans Schütz, Royal Bavarian judge, and Zacharias Hoenning, Royal Bavarian secretary. It further appeared from an affidavit of a sister of the applicant in whose charge she was that the applicant had no means whatever beyond the fund now standing to her separate account.

It was intimated by Herr Schütz that the German Court would not be satisfied with a mere order for the payment of the income of the fund, but desired to have the corpus remitted to its officials; and he submitted in writing a number of reasons why the fund should be remitted to that country, namely: "(*a*) That Baroness Virginie Von Linden is a German and has nothing to do with England; (*b*) that Baroness Linden is under the guardianship of a German Court, and the power to dispose of and administer the property of Baroness Linden appertains solely to this court of guardianship in con-

junction with the guardian; (*c*) that in the exercise of this power of administration the court of guardianship is entitled to make and has made the application for the handing over of the property of the ward; (*d*) that the withdrawing of the Linden capital in the face of this application would constitute an unjustifiable violation of the rights of third parties; (*e*) that no liability can possibly be cast upon the English Court by reason of the handing over of the capital in view of the evidence produced."

This document was addressed to the solicitors in the matter; it was signed by Herr Schütz and it was under the seal of the Court.

Stirling J. made an order in chambers for payment out of the income of the fund to the members of the deposit commission; but so far as the application related to the corpus of the fund, he adjourned it into court for further argument.

Hastings, *Q.C.*, and *W. C. Druce*, for the applicant. There is here a finding by a foreign court of competent jurisdiction that the applicant is a lunatic, and there is what practically amounts to the vesting of the lunatic's property in the Court or the deposit commission of the Court. The permanent arrangement for the charge and care of the lunatic's property is that it should come into the hands of the deposit commission, and the commission has power to give receipts. This fund ought therefore to be remitted to the deposit commission: *Scott* v. *Bentley* (1); *Hessing* v. *Sutherland* (2); *In re Elias* (3); *In re Stark* (4), though in that case the Court in the exercise of its discretion ordered the payment out of the dividends only.

Newton v. *Manning* (5) shews that if a person invests himself abroad with full right to receive the property of a person found lunatic there, he may by applying to the jurisdiction of this country obtain the lunatic's property. The essential point is that he should be armed with the authority of the foreign jurisdiction. *In re Barlow's Will* (6) is distinguishable, because

(1) (1855) 1 K. & J. 281.
(2) (1856) 25 L. J. (Ch.) 687.
(3) (1851) 3 Mac. & G. 234.
(4) (1850) 2 Mac. & G. 174.
(5) (1849) 1 Mac. & G. 362.
(6) 36 Ch. D. 287.

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that was a case of a colonial lunatic patient not so found by inquisition, and it was held that the colonial master in lunacy had no sufficient authority under the colonial law to require payment of the fund out of court. It did not turn on the point that there had been no formal vesting order: see per Lindley L.J. in *In re Brown*. (1)

The application in this case is virtually a request by the Bavarian Court itself.

STIRLING J. In this case a very considerable sum of Consols is standing to the credit of a lady named the Baroness Virginie Aloyse Ernestine de Linden, a person of unsound mind so found by the Royal Bavarian Court at Nördlingen. An application is now made by her through her next friend, being a judge of that Court, for the transfer to the Bavarian Court of this fund. The lady is a daughter of an Englishwoman, but that is her sole connection with England; her father was a German; her nationality is German; her domicil is German, and her present residence is German, namely, in Bavaria; and, therefore, it is clear that in every point of view the tribunals of Germany are the proper courts to determine the legal status of this lady. Also, it is in evidence that the Royal Court of Bavaria at Nördlingen, being the proper tribunal for the purpose, has given a judgment by which the lady is made a ward of that Court as being of unsound mind. There is therefore a finding by the Royal Court that this lady is of unsound mind, and she has become a ward of that Court, by which I understand that both her person and property are put under the charge of the Court. It further appears that that Court acts not merely in a judicial but also in an administrative capacity, very much in the same way as our own Court; and it further appears that that Court has full power to give receipts for all the property of the lunatic. Further, I understand that this sum of Consols is the sole property of this lady; and I have made an order in chambers directing payment of the interest to the two gentlemen who constitute the deposit commission which is the administrative section of the Court.

(1) [1895] 2 Ch. 666.

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But as the fund is a large one, I was desirous before dealing with the capital that the matter should be fully argued in Court, in order that I might satisfy myself that this was a proper order to make.

The difficulty which I felt was occasioned by the case of *In re Barlow's Will* (1); and I am bound to say that there are some expressions in the judgments delivered in the Court of Appeal in that case which would have caused me to hesitate had it not been for the more recent case of *In re Brown.* (2) The decision in that case is not in point, because it related to the exercise of the statutory jurisdiction under the Lunacy Act, 1890, which of course I cannot exercise. But the importance of the case is, that it contains a discussion by Lindley L.J. of the previous cases, including *In re Barlow's Will.* (1) He there says (3): "If now we turn to previous decisions, we find that orders have been made transferring stocks, funds and securities to curators of lunatics resident out of England, namely, in France, Holland and Scotland, although the property of such lunatics was not vested in their curators in the strict technical sense of that expression"; so that he recognises that a transfer may be made, although the property is not technically vested in the person to whom it will be transferred. Then, dealing with *In re Barlow's Will* (1), he says: "The Master in Lunacy, appointed by the Supreme Court of New South Wales under the New South Wales Lunacy Act, applied for a transfer to him of a sum of 2249*l.* 18*s.* New 3 per cent. Annuities belonging to the lunatic and paid into court under the Trustee Relief Act. The lunatic there was not judicially declared lunatic, and the Court held, first, that the colonial master had no absolute right to have the whole sum transferred to him, but an order was nevertheless made for the payment to him of part of the capital, namely, 803*l.*, and of the future dividends. The lunatic in that case was only a patient not judicially declared to be insane, and the Court felt considerable difficulty in making any order at all for payment to the colonial master. But it is obvious from the judgments that, if the lunatic had been

(1) 36 Ch. D. 287. (2) [1895] 2 Ch. 666.
(3) [1895] 2 Ch. 671.

STIRLING J. judicially declared lunatic so that his legal status had been altered, the Court would not have felt any difficulty in making any order which the Court thought proper for transferring the annuities to the colonial master." [His Lordship also pointed out that *In re Barlow's Will* (1), like the present case, did not turn (as did *In re Brown* (2)) on the provisions of the Lunacy Acts of this country.]

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Now what have we here? Really, in substance though not in form, a request from the Court of Bavaria itself asking me to direct a transfer. There is in evidence a document signed by one of the members of the deposit commission, who is himself a judge of the Royal Court of Bavaria, sealed with the seal of the Court, authorizing the solicitors in the matter to make the application, and stating the grounds upon which the money ought to be remitted to the German Court. It further appears that the lunatic has brothers and sisters, who are presumably her next of kin, living in Germany.

Looking at all the circumstances of the case, seeing that the lady's connection with England is of the slightest possible description, seeing that there has been a legal adjudication by a court of competent jurisdiction by which the lady's legal status has been declared to be that of a lunatic, and that there is attached to that Court a deposit commission which is appointed for the purpose of taking charge of the property of lunatics, and seeing that this fund is the only property of the lunatic, and that her relatives are resident in Bavaria, I think that if I have jurisdiction, as it appears to me that I have, this is a case in which I ought to exercise it, and make the order that the fund should be dealt with in the manner proposed by the summons.

Solicitors: *West, King, Adams & Co.*

(1) 36 Ch. D. 287. (2) [1895] 2 Ch. 666.

H. B. H.

STOKELL *v.* HEYWOOD.

KEKEWICH J.

1896

June 8.

[1895 S. 3931.]

Accident Policy—Contract—Renewal—Continuation of Old Contract—New Contract—Policy Money—Insolvency—Creditors' Deed.

Accident policy renewable yearly so long as the assured pays the specified premium in advance and the insurance company consent to receive it, and requiring the assured at each renewal to give notice of any change in his state of health since the payment of the last premium, with power for the company in such case to determine the policy:

Upon the payment of the premium for each year, an entirely new contract arises for that year only, and the amount payable under it on the accidental death of the assured in the current year for which a premium has been paid is not affected by any assignment or other obligation made or entered into by the assured in any previous year and not extending to after-acquired property.

On August 31, 1880, one William Watson effected an accident policy for 500*l.* with the Guarantee and Accident Company, Limited. The policy, after reciting that the assured had paid the sum of 1*l.* 15*s.* "as a premium or consideration for the proposed assurance for one year from the date hereof," witnessed that the company agreed "that, if at any time before the expiration of one year from the date of this policy, or at any time thereafter, so long as the assured shall pay on or before the day of the date of this policy in every year, and the company shall consent to receive, the premium above specified, the said assured shall sustain any personal injury caused by accidental external violence within the meaning of this policy and the conditions hereto, and such injury shall be the immediate cause of death," then the funds of the company should be liable to pay the sum thereby assured to the legal personal representatives of the assured within three calendar months after proof of death. Then the policy went on to provide for a weekly allowance or compensation in case of entire or partial disablement. Indorsed on the policy were a number of conditions, one of which, No. 5, was as follows: "The assured shall, at each renewal of the within policy, give notice to the company of any disease or

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physical defect with which he has become cognizant or affected since the payment of the next preceding premium. And the company may at any time by notice in writing determine this policy as from the receipt of such notice, without prejudice to the rights of the assured in respect of prior accident, provided that the company shall return to the assured the premium paid by him less a pro rata part thereof for the portion of the year the policy has been in force . . . ." The policy gave no days of grace.

Watson renewed or kept up the policy year by year. In June, 1893, being in difficulties, he called a meeting of his creditors, and on July 4, 1893, a deed was executed whereby he, Watson (thereinafter called "the debtor"), conveyed and assigned to the plaintiffs (thereinafter called "the trustees") "all and singular the lands, tenements, and hereditaments, goods, chattels, and moneys, credits, estate, and effects whatsoever and wheresoever, of or to which the debtor is seised, possessed, or otherwise entitled for his own benefit, or in any manner howsoever," except wearing apparel, &c., not exceeding 20*l.* in value, to hold unto and to the use of the trustees in trust for sale and to divide the proceeds among the creditors of the debtor rateably. And the debtor thereby covenanted with the trustees to make a full and true discovery to them of all his creditors and the amounts of his debts, and to give such further inventory of his property, such lists of his creditors and debtors, and of the debts owing to and from them respectively, and to do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as might be reasonably required by the trustees, and to aid to the utmost of his power in the realization of his property and the distribution of the proceeds amongst his creditors. The deed contained no covenant by the debtor for the assignment to the trustees of any further or after-acquired property. At the date of the deed the property of the debtor was estimated at 990*l.*, while his debts amounted to 1445*l.*

On September 2, 1893, Watson paid a premium for the renewal of his policy for twelve months to August 30, 1894, and on September 1, 1894, he paid a premium for renewal for

a further twelve months to August 30, 1895. On June 26, 1895, he was struck dead by lightning. He left a will appointing the defendants his executors.

A dispute having arisen as to whether the 500*l.* payable under the policy belonged to the trustees under Watson's assignment or to his executors, the money was paid into court by the company under an order made on an interpleader summons taken out by them in an action in the Queen's Bench Division brought against them by the executors. The present action was brought by the trustees against the executors claiming a declaration that, in the events which had happened, the trustees were entitled to the benefit of the policy, subject to their paying to the executors the amount of premium paid by Watson to keep the policy on foot since the date of the assignment, with interest. The action now came on for trial.

Bramwell Davis, Q.C., and *E. Beaumont*, for the plaintiffs. We submit that this policy money passes to the plaintiffs under the assignment of July 4, 1893, as the contract under which it has been paid was an existing contract at that date, and as such formed part of the "estate of which the debtor was possessed" at the time. A policy of this kind is not to be regarded as a contract subsisting merely for the particular year for which the premium is paid, but, like a life policy, as a continuing contract, that is, a contract commencing at the date when the policy is first taken out, and continuing so long as the conditions are complied with: *In re Turcan* (1); *Salvin* v. *James* (2); *Simpson* v. *Accidental Death Insurance Co.* (3)

Warrington, Q.C., and *Yarborough Anderson*, for the defendants. This policy is carefully framed so as to exclude its being of a binding character beyond the current year in respect of which the premium is paid. The company expressly reserve to themselves the right at the end of the current year to refuse to accept the risk for the ensuing year. The true effect of the policy is that, every time a premium is paid, a fresh contract is created, so that the contract under which the 500*l.* has been

(1) (1888) 40 Ch. D. 5, 10. (2) (1805) 6 East, 571, 582.
(3) (1857) 26 L. J. (C.P.) 289.

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paid was not in existence at the date of the deed of assignment, and the deed contains no covenant for the assignment of after-acquired property of the debtor. If the plaintiffs' construction of the policy is the correct one, they would have been equally entitled to an allowance in case of disablement; but it could never have been intended that assignees of the assured might claim payment to them of an allowance given to him personally to cover medical and other expenses. The policy gives no days of grace, and therefore, the payment by Watson of his premium after the expiration of the previous year, created an independent contract. The difference between a life policy and an accident policy is that under the former there is a contract created once for all, whereas under the latter the assured has to report as to his state of health as a condition precedent for each proposed renewal of the policy. Again, a life policy has an actuarial value at any time before it is paid, whereas an accident policy has no value except for the particular year during which it is current. None of the cases cited apply to the present, for the conditions were different; and in *In re Turcan* (1) there was a covenant to settle after-acquired property of the assured, which is not to be found here. Accordingly we say that the contract under which the company paid was a fresh obligation to which Watson became entitled subsequently to the date of the assignment, and that therefore the money belongs to the defendants as his executors, and not to the plaintiffs.

Bramwell Davis, Q.C., in reply. The short question is, Upon each renewal of the policy is there a fresh contract or a continuation of an existing contract? I submit the latter.

If the effect of an accident policy is to create a new contract each year, the original policy is not sufficient; there must, for each year, be a new policy, with a fresh stamp and a fresh declaration by the assured.

KEKEWICH J. The question is whether the money received from this accident company passed under the words in the deed of July 4, 1893, "All and singular the lands, tenements,

(1) 40 Ch. D. 5.

and hereditaments, goods, chattels, and moneys, credits, estate, and effects whatsoever and wheresoever," and so on. At the date of that deed the money was not receivable: there was no debt passing, or anything of that kind; but there was a contract to pay in certain events: and it seems to me clear that that contract passed as a contract, or, as it is more properly termed, a chose in action. That has not been contested at the Bar. The real question is whether the money which has been paid by the accident company is money paid under that contract which was so assigned. The words of the grant are words in præsenti, and contain nothing to shew that money accruing at a future date was to pass. That is borne out by the covenant of the debtor, who is to make full and true discovery of his affairs, and so on, and give such further inventory of his property as may be required. That must mean property to which he was then entitled, the property which was to be realized, the property which was by the process of realization to be distributed among his creditors.

The year of the policy in which that deed was executed expired and no accident happened: no money ever became payable during that year, and then the policy was renewed. Ultimately the accident occurred and the money was paid. The question is whether it was paid under that policy. In one sense, beyond all question, it was, for there was no other policy. I see there is no indorsement of receipt on the policy; but there can be no doubt that the company paid on this policy, and that there has never been any other contract under which the money could have been paid.

What is the contract? The contract is to pay 500*l.* if a fatal accident happens within the twelve months. There is no contract, on the face of it, to pay any money at all for any accident happening after the expiration of the twelve months. But the policy provides really, though not in express terms, for renewal, and shews that it was intended by the parties that the policy might be from time to time renewed on payment of the premium for the ensuing year, and that on such payment the policy was to be retained by the assured; but it contains a clause peculiar to this kind of policy, which requires

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consideration; I mean the 5th clause: "The assured shall, at each renewal of the within policy"—there is no contract to renew, but it contemplates a possible renewal—"give notice to the company of any disease or physical defect" of which he has become cognizant since the payment of the previous premium. The clause does not go on to say that if he does not give such notice the policy shall be void; nor does it say that the company may, upon such notice being given, insist upon another and a different premium; but it says that the company may at any time by notice in writing determine the policy. That shews that it is for them to consider year by year whether they shall continue the policy or whether they shall refuse the risk altogether; and in the body of the policy it is provided that the premium for renewal is to be paid with the "consent" of the company, shewing that the renewal is in the company's discretion.

Putting those two provisions together, the meaning of the policy is that at the expiration of the year the company may do one of two things: they may either receive the premium and continue the policy for another year, or, if they receive a notice from the assured as required by the 5th condition, they may refuse the premium with a view to determining the risk altogether. But they may do more than that: they are not bound to receive the premium at all; they may refuse it without giving any reason: they may simply say, "We insured you for a year, and now there is an end of the contract." A consideration of this policy seems to me to shew, that though, in one sense, it is a continuing policy—and there is, as I have said, no doubt that the office paid under this very policy—yet a new contract was made from time to time, from year to year.

I think, having regard to the terms of the assignment, it would be going too far to say that, because the office paid under this policy, which was a contract renewed from time to time by consent, therefore the deed passed the rights under that renewed contract, which should properly rather be described as a new contract.

Though the point is a somewhat narrow one, it is not by any

means free from difficulty; but I think the right view is that the 500*l.* did not pass, and I so hold. KEKEWICH J. 1896 STOKELL v. HEYWOOD.

[Notice of appeal from this decision was given by the plaintiffs, but was subsequently withdrawn.]

Solicitors: *Bell, Brodrick & Gray; Crossman & Prichard.*

G. I. F. C.

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KEKEWICH J. 1896 *Nov.* 17, 18, 19.

[1895 P. 2364.]

Copyright—Literary and Artistic—Registration—Validity—Trustee or Agent—Book containing Drawings—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 13—*Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4.

Registration of copyright under the Copyright Act, 1842, or the Fine Arts Copyright Act, 1862, in the name of a person who is a mere agent or nominee of the proprietor of the copyright, and not a trustee of the copyright for him, is bad; and joinder of the unregistered proprietor as co-plaintiff with the person so improperly registered will not render an action for infringement of the copyright maintainable.

London Printing and Publishing Alliance v. *Cox*, [1891] 3 Ch. 291, followed.

Accordingly, where copyright which belonged to a limited company was registered in the sole name of their managing director, and it was not shewn that he was a trustee of the copyright for them, an action for infringement of the copyright by the director and company as co-plaintiffs was held not to be maintainable.

Registration of a book under the Copyright Act, 1842, in the name of the author of the letterpress does not confer any protection in respect of drawings which are introduced into the book as illustrations and the art copyright in which is vested in other persons.

Grace v. *Newman*, (1875) L. R. 19 Eq. 623, distinguished.

Under the Fine Arts Copyright Act, 1862, it is not necessary that any agreement in writing should be made or entered on the register where registration is in the name of the person for or on behalf of whom a drawing is made or executed for a good or valuable consideration.

THIS action was brought by Petty & Sons, Limited, a printing and publishing company, and Wesley Petty, the managing director of the company, as co-plaintiffs, against Taylor & Winterbottom, a firm of printers and lithographers, and William Blackburn & Co., clothiers, claiming an injunction

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to restrain the defendants from making, publishing, and selling any copies or colourable imitations of certain books including a trade catalogue or circular called "The Art and Virtue of Dressing Well," registered in July, 1893, pursuant to the Copyright Act, 1842 (5 & 6 Vict. c. 45), and also two drawings respectively entitled "Drawing of a Gentleman in a single-breasted Chesterfield," and "Drawing of a Gentleman in a Chesterfield Overcoat," both registered on October 31, 1895, under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), delivery up to the plaintiffs of all blocks and copies or colourable imitations of the books and works, penalties pursuant to the statutes, and damages.

The plaintiffs by their statement of claim alleged that the plaintiffs, Petty & Sons, Limited, were beneficially interested in the copyrights, and entitled to the property in all the books or pamphlets and the contents thereof, and the drawings or works, and that the plaintiff Wesley Petty always had been and was registered as proprietor for and on behalf of Petty & Sons.

The defendants, in their defence, alleged that Wesley Petty was not, in fact, the proprietor of the copyright either on behalf of the plaintiff company, or otherwise, and they contended that the registration was invalid, and that the action was not maintainable.

The action was tried with witnesses, when the following facts appeared: The book called "The Art and Virtue of Dressing Well" (which it is alone necessary to notice for the purposes of this report) contained, amongst other drawings, the two drawings of gentlemen in Chesterfield coats, as well as certain printed matter describing and advertising articles of clothing. In the case both of the book and of the drawings the registration of the copyright was in the sole name of Wesley Petty, and there was no entry in the register of any agreement in writing vesting the copyright in him. The letter-press in the book was prepared by Wesley Petty. The order for the drawings was given by him to the defendants Taylor & Winterbottom, who employed an artist to draw the figures. The drawings were then engraved by Taylor & Winter-

bottom, and were paid for by the company. Both the book and the drawings were prepared and used solely for the purposes of the company's business. There was no evidence of any resolution having been passed by the company, or agreement made that Wesley Petty was to be trustee for the company of the copyright in the book and drawings.

Before the incorporation of the company the business now carried on by them had been carried on by Wesley Petty alone, and subsequently by a firm in which he was a partner, and the practice had been for Wesley Petty to be registered as the proprietor of the copyright of all books and drawings used in the business.

Evidence was also given for the purpose of shewing that the copyrights of the plaintiffs had been infringed by the defendants, such evidence being addressed mainly to the case of the drawings. The question upon which the case calls for a report was whether, having regard to the manner of registration, and to the provisions of the Copyright Act, 1842 (1), and the Fine Arts Copyright Act, 1862 (2), it was competent to the plaintiffs to maintain the action.

(1) The material provisions of the Copyright Act, 1842, are as follows:—Sect. 13: "And be it enacted, that after the passing of this Act it shall be lawful for the proprietor of copyright in any book . . . . to make entry in the Registry Book of the Stationers' Company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said company . . . ."

(2) The material provisions of the Fine Arts Copyright Act, 1862, are as follows:—Sect. 1: "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on

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Warrington, Q.C., and *Israel Davis*, for the plaintiffs. As regards the drawings, the plaintiff Wesley Petty is the person for or on behalf of whom they were made or executed for a good or valuable consideration within the meaning of s. 1 of the Fine Arts Copyright Act, 1862, and his name was, therefore, rightly placed on the register under s. 4 of the Act. The circumstance that there was no agreement in writing entered on the register is immaterial. If the proviso in s. 1 is carefully read, it will be seen that it is only in two specified cases—namely, where the person selling, disposing of, or making or executing the work of art for value, retains the copyright in it, or where the proprietor is the vendee from or assignee of the original proprietor—that an agreement in writing is required; no such agreement is required where, as in the present case, the original proprietorship is vested in the person for or on

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behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect."

Sect. 4: "There shall be kept at the hall of the Stationers' Company . . . . a book or books entitled 'The register of proprietors of Copyright in paintings, drawings and photographs,' wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration."

whose behalf the work of art is made or executed. It is true that when the drawings were executed the company was to have the benefit of them, but they were none the less executed for or on behalf of Wesley Petty. It is clear upon the evidence that it was intended that the beneficial interest in the copyright should belong to the company, in whose business the drawings were used; and there is nothing in the statute to prevent the registration of copyright in the name of one person on behalf of others for whom he is trustee: *London Printing and Publishing Alliance* v. *Cox*. (1)

[KEKEWICH J. There is no doubt about that, but it must be proved that he is a trustee in whom the proprietorship in the copyright is vested.]

It must be taken that Wesley Petty, being the person nominated by the company to take registration on their behalf, was intended to and did acquire the copyright as trustee for them. The object of registration is simply to inform the public in whom the copyright and the right to prevent infringement is vested. But in the present case all difficulty is removed by the fact that the company are joined as co-plaintiffs, and thus the proprietors of the copyright and the person in whose name the copyright is registered are alike before the Court.

The case of the book rests on a different footing from that of the drawings. Wesley Petty was the author of the letterpress, and therefore primâ facie the proprietor of the copyright, which vested in him as trustee for the company.

Renshaw, Q.C., Tindal Atkinson, Q.C., and *Errington*, for the defendants. This action cannot be maintained. The registration of the copyrights in the sole name of Wesley Petty was altogether bad, because he was neither the "proprietor" within the Act of 1842, nor the person in whom the copyright was vested within the Act of 1862. He was a mere agent or nominee of the company, who were the real proprietors of the copyrights. Registration of copyright in the name of an agent or nominee of the proprietor of the copyright is not only not recognised by either of the Acts, but is contrary to their plain

(1) [1891] 3 Ch. 291.

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intent and meaning. If it had been shewn that Wesley Petty was registered as a trustee for the company, then, no doubt, according to *London Printing and Publishing Alliance* v. *Cox* (1), and upon general principles, the registration might be supported; but in order to establish such trusteeship the first step is to shew that there was property vested in him of which he could be trustee—that is to say, that the proprietorship of these copyrights was in him, and the evidence on the part of the plaintiffs wholly fails to shew this.

The case of the book, assuming that Wesley Petty was the author, in no way differs from that of the drawings. The book and drawings were alike prepared on behalf of the company and for their purposes, and the proprietorship in both was in them.

Wesley Petty being thus disentitled to sue because improperly registered, the fact that the company, who are not registered at all, are joined as co-plaintiffs with him will not help the plaintiffs. The joinder of two plaintiffs, neither of whom has a right of action, cannot create a right of action: see *London Printing and Publishing Alliance* v. *Cox*. (2)

As regards the drawings, the plaintiffs appear to claim copyright in the same subject-matter under two different Acts of Parliament. Such a claim is clearly unsustainable, the provisions of the Acts and terms of duration of the copyrights under them being different, so that it would be impossible to know when such a copyright as that claimed determined.

Warrington, Q.C., in reply. If the plaintiffs are wrong under the Act of 1862, then I submit that, according to the decision in *Grace* v. *Newman* (3), they are entitled to protection in respect of the drawings as being a substantial part of the book of which Wesley Petty was clearly the author. [He referred also to *Pollard* v. *Photographic Co.* (4), *Nottage* v. *Jackson* (5), *Tuck & Sons* v. *Priester* (6), *Wooderson* v. *Tuck & Sons* (7), and *Melville* v. *Mirror of Life Co.* (8)]

(1) [1891] 3 Ch. 291.
(2) Ibid. 303.
(3) L. R. 19 Eq. 623.
(4) (1888) 40 Ch. D. 345.
(5) (1883) 11 Q. B. D. 627.
(6) (1887) 19 Q. B. D. 48, 629.
(7) (1887) 4 Times L. R. 57.
(8) [1895] 2 Ch. 531.

KEKEWICH J., after commenting on the evidence, continued as follows:—On the question of law I have only to decide one point. That point is this: Both as regards the Fine Arts Copyright Act of 25 & 26 Vict. c. 68, and the Copyright Act of 5 & 6 Vict. c. 45, Mr. Wesley Petty is registered as the proprietor of the copyright. Each statute in effect provides that there shall be entered on the register the name and place of abode of the proprietor of the copyright; and in each entry Mr. Wesley Petty is alone described as the proprietor of the copyright. If, as a matter of fact, he was not the proprietor, then there is no registration. I assume that the case of the plaintiffs is dependent on registration, and, the registration failing, the case fails also. The action is brought by Mr. Wesley Petty and Petty & Sons, Limited, as co-plaintiffs, and in my opinion Petty & Sons, Limited, are in fact the proprietors of these copyrights, but they are not registered. Now it is decided, and it seems to me to be perfectly clear even without a decision, that a combination of two persons, neither of whom is entitled to sue, cannot constitute a person who is entitled to sue. In the case of the *London Printing and Publishing Alliance* v. *Cox* (1) Fry L.J. puts it in this way: "I have no doubt whatever that a trustee in whom a copyright is vested may be registered as the owner, and may sue in that character; but it is impossible for one person to be the owner and another person to be on the register, and for those two persons successfully to sue." If Petty & Sons, Limited, are the proprietors and Wesley Petty is not the proprietor, then this case is exactly that which the Lord Justice put. No possible status can be given to one bad plaintiff by the conjunction of him with another bad plaintiff. Of course, if either is a good plaintiff, the conjunction with a bad plaintiff would in these modern days not matter. The question is, Is Mr. Wesley Petty the proprietor of these copyrights, or any of them? To my mind the answer to that question is precisely the same under both Acts. Mr. Warrington has endeavoured to separate them, and to say that they raise different considerations; but it seems to me that for the present purpose the arguments

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(1) [1891] 3 Ch. 303.

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which are applicable in one case are equally applicable in the other. Referring first to the Act of 1862 (25 & 26 Vict. c. 68), I agree with the argument that under the first section of that Act three different states of circumstances are contemplated. Either the person who is the author may be the proprietor of the copyright, or the vendee, or assignee from him, may be the proprietor, or the proprietor may be a person for or on behalf of whom the work of art has been made or executed for a good or valuable consideration. If I thought in this case that these drawings were made or executed for or on behalf of Wesley Petty, I should consider that he was properly registered as the proprietor, notwithstanding that there is no agreement in writing entered on the register. The agreement in writing would be wanted if it was intended to reserve the copyright to the author as against a vendee or assignee. It would be wanted also if it was intended to vest that copyright in the vendee or assignee. It is not wanted, as I understand the meaning of the first section, where the copyright is vested in a person for or on behalf of whom the work of art was made or executed. The point is deserving of attention; but I need not further refer to it, because the case really turns on the fourth section, which provides that there shall be entered on the register "the name and place of abode of the person in whom such copyright shall be vested." Now, the registered proprietor of the copyright in these two figures is Mr. Wesley Petty. He is the managing director of Petty & Sons, Limited. It is, I think, immaterial that before the incorporation of the company he carried on business by himself or in partnership, though I observe, of course, that it is the old practice, existing before the incorporation, which has led to the present dilemma. He was, throughout all these transactions, the manager, the active man, and representative of Petty & Sons, Limited. He was minded to have drawings of these two figures produced for publication in the proper way in the course of business. His firm print; they, as a rule, do not do anything more than print. They therefore employed the firm of Taylor & Co. to produce the figures which they wanted, namely, those of two gentlemen in different attitudes clothed in Chesterfield coats. Taylor & Co.

employed an artist to design the drawings. The exact relation of the artist to Taylor & Co. is not quite clear, but he seems to have been one whom they from time to time employed, and I gather that Petty & Sons, Limited, not only knew Taylor & Co., but also knew the artist. But he must be regarded as merely a servant of Taylor & Co., who were employed by Wesley Petty, the managing director of Petty & Sons, Limited. It seems to me to be established beyond dispute, that Petty & Sons, Limited, acted through their agent in instructing Taylor & Co., who executed the order through their agent, the artist; but there was no employment of the artist by Wesley Petty in his individual personal character. He never purported to give directions, or to pay a bill, or in any way throughout to do anything of any kind connected with this business, except in his character of representative of the incorporated company, Petty & Sons, Limited. Then it is said that he is a trustee for the company. It is more easy sometimes to say that a man is a trustee than to explain how he is a trustee, or why. In one sense he is a trustee for the company. I have no doubt that if he can properly be held to be the proprietor of this copyright, he is so far a trustee of his proprietorship for the company that he cannot set up his own title against his principals; but he is not a trustee in the sense that any legal ownership ever became vested in him. Copyright is a thing known to the law as capable of acquisition and assignment in a particular way, and there is nothing to shew here that Wesley Petty ever acquired anything at all. He acted simply as the agent of the incorporated company. There is a passage in the judgment of Lindley L.J. in the case of *London Printing and Publishing Alliance* v. *Cox* (1) which I think worthy of notice on this point, though, perhaps, not as a decision. He was considering there the relative position of Mr. Keep and the proprietors of *Myra's Journal*, and how far there had been an assignment by the one to the others. He assumed that Mr. Keep had the property vested in him when he wrote a certain letter of April 19, and then he says (2): "It is contended that this letter amounted to

(1) [1891] 3 Ch. 291. (2) [1891] 3 Ch. 301.

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an assignment of the copyright by Mr. Keep to *Myra's Journal*. If it did, then the proprietors of *Myra's Journal* were, from April 19, the proprietors of the copyright; but the proprietors of *Myra's Journal* are not registered, and they cannot therefore maintain the action. If, on the other hand, that letter did not amount to an assignment of the copyright, then the copyright would remain with Mr. Keep, as a trustee for the proprietors of *Myra's Journal*, and, Mr. Keep being registered, the action may be sustained so far as that point of form is concerned." Lindley L.J. is there dealing with a case where there was undoubtedly a proprietor. Mr. Keep was originally the proprietor of the copyright. The question was whether he had or had not assigned. If he had, then the proprietorship had passed; if he had not, it remained in him. But having started with one proprietor, if you want to discover another you must find an assignment. There is no pretence for saying there is an assignment here. Wesley Petty did not acquire the copyright for himself, but merely as an agent. The result is, that Wesley Petty has been wrongly registered as proprietor of the copyright in these drawings, and on that ground the registration of the art copyright fails.

I turn now to the statute 5 & 6 Vict. c. 45. To my mind the question here is precisely the same, but Mr. Warrington made one point in his reply which must be noticed. By s. 13 of the statute in question it is required that "the name and place of abode of the proprietor of the copyright" shall be entered on the register. In the case of this copyright Mr. Wesley Petty occupied precisely the same position as in the other case. He acted merely as the agent of Petty & Sons, and, as in the other case, he was a nominee, but not a trustee. He was not a trustee, because no property was acquired by or vested in him. But it is argued that there is a distinction. It is sufficient for me to notice the book called "Art and Virtue of Dressing Well." It is said that as Mr. Wesley Petty prepared the letterpress of that book, which is a substantial part of it, he could register the book, as having been the author of it, and that the book being properly registered in his name the figures which form part of the book are protected. I will

assume in the plaintiffs' favour that Mr. Wesley Petty was the author of the letterpress, and in that way the author of the book. He put into the book these drawings which, as I have said, were not his nor produced by him, and the copyright in which, if there is any copyright at all, is not vested in him. Here I note the practical force of the difficulty raised by Mr. Renshaw, that copyright cannot be rightly claimed in one and the same work under two different statutes and two different registrations, a point which may deserve much further consideration; but I am only dealing now with Mr. Warrington's point, in support of which *Grace* v. *Newman* (1) was cited. The head-note of that case, which, as I have taken care to see, conforms to the Vice-Chancellor's judgment, is as follows: "The plaintiff, a cemetery stonemason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letterpress. *Held*, that the plaintiff had copyright in the book, and was entitled to an injunction to restrain the publication of designs copied from it." If my view is right, Mr. Wesley Petty never personally employed or remunerated any one. He did so in his character of agent, but not otherwise; and, assuming him to have been the author of the letterpress, yet the rest of the book, that is to say, the figures, were not done for him, but for somebody else; and it seems to me monstrous to suppose, and I am sure *Grace* v. *Newman* (1) does not support the proposition, that a man in protecting his copyright in the letterpress of which he is the author can thereby protect or acquire any copyright in works of art which are introduced into the letterpress as illustrations, and the copyright in which is vested in other persons who are strangers to the literary author. It is not at all an uncommon case for two persons jointly to publish a book, one supplying the letterpress, the other the illustrations. I cannot see my way to saying that in such a case the man who is the author of the letterpress becomes the author of the book, including the illustrations, so as to protect those illustrations. I cannot see why the contention should not be reversed, and the author of the illustrations

(1) L. R. 19 Eq. 623.

KEKEWICH J. 1896 PETTY v. TAYLOR.

should not equally claim protection for them, and through them for the letterpress of which he never wrote a word. That seems to reduce the argument to an absurdity; and I do not find anything in the Act or the cases cited to support any such conclusion. I hold in the present case, as well under the one Act as under the other, that the name and place of abode of the proprietor of the copyright, or, as it is in the later Act, the name and place of abode of the person in whom the copyright is vested, are not in fact stated on the register; because the person there named is Wesley Petty, whereas it ought to have been Petty & Sons, Limited, and that Wesley Petty cannot be registered as a trustee for Petty & Sons, Limited, so as to vest in him a title to sue on their behalf, because in fact there is nothing vested in him of which he can be trustee. In my judgment a trustee may be registered and can sue with or without the concurrence of his cestui que trust; but a nominee cannot be properly registered, and if registered cannot sue, notwithstanding that the person by whom he has been nominated, on whose behalf he purports to have a copyright, is joined as a co-plaintiff. The result is that the plaintiffs' case fails, and there must be judgment for the defendants with costs.

Solicitors: *Herbert Bentwich*; *Vincent & Vincent, for Bowling & Son, Leeds; Pitman & Sons, for Herbert Denison, Leeds.*

C. C. M. D.

DAVIS *v.* INGRAM.

KEKEWICH J.

1897

Jan. 16.

[1896 D. 1854.]

Practice—Partition Action—Form of Judgment—Infants entitled to one undivided Third.

Form of judgment in action for sale in lieu of partition, where infant plaintiffs are entitled to one undivided third, declaring infants, in event of a sale taking place, to be trustees for the purchaser, and directing conveyance by next friend.

THIS action was brought by three infant plaintiffs suing by their next friend, James Ingram, for the purpose of obtaining a sale in lieu of partition of certain freehold hereditaments, consisting of a messuage, cottages, and land, devised by the will of a testator. Under the will the plaintiffs were entitled to one undivided third part of the hereditaments, and the defendants to the other two-thirds.

Percy F. Wheeler, for the plaintiffs, asked the Court to pronounce judgment directing usual inquiries, and also directing that in the event of a sale taking place the infant plaintiffs might be declared to be trustees, and their next friend appointed to convey on their behalf, according to the form in Seton on Judgments, 5th ed. vol. ii. p. 1542, No. 21.

KEKEWICH J. pointed out that the form in Seton was applicable to a case in which there was an absolute order for a sale. In the present case the sale was necessarily hypothetical, and depended on the answers to the inquiries; and his Lordship was not sure that it was consistent with the practice to give elaborate directions as to conveyance in a case where it was not certain that there would be a sale; but if the registrar was satisfied upon inquiry that such directions were not inconsistent with the practice, the judgment might be drawn up in the manner asked.

Gore-Browne, and *E. A. Jelf*, for the several defendants.

The judgment as ultimately drawn up, after directing usual

KEKEWICH J. 1897 DAVIS v. INGRAM.

inquiries, including an inquiry whether it would be for the benefit of such of the persons interested in the hereditaments as were infants that the same should be sold, proceeded as follows:—

And if it shall be certified that all the persons interested are parties to this action, and either (1.) that the parties desiring a sale (other than the infants) are interested to the extent of one moiety or upwards in the said hereditaments, or (2.) that it will be for the benefit of the said infants that the said hereditaments should be sold, and that the parties desiring a sale (including the said infants) are interested to the extent aforesaid: It is ordered that the said hereditaments be sold, with the approbation of the judge.

And it is ordered that the money to arise from such sale be paid into court to the credit of this action.

But if it shall appear that any of the persons interested are not parties to this action, then It is ordered that any of the persons interested collectively or individually to the extent of one moiety or upwards in the said hereditaments be at liberty, when it shall have been certified that the persons who ought to be served with notice of this judgment have been so served, to apply at chambers for a sale of the said hereditaments, the said infants not to be at liberty to apply hereunder unless and until it shall have been certified that it will be for their benefit that the said hereditaments should be sold.

And this Court doth declare that upon any such sale being made, such of the parties interested in the said hereditaments as are infants will be trustees for the purchaser or purchasers of their undivided share or shares of the said hereditaments within the meaning of the Trustee Act, 1893.

And it is ordered that James Ingram of, &c., the next friend of the plaintiffs, be appointed to convey such share or shares to the purchaser or purchasers of the said hereditaments.

And it is ordered that the said James Ingram, upon payment into court by any purchaser of the amount of his purchase-money, convey to such purchaser accordingly the property bought by him.

[Usual directions as to liberty to bid, as to set-off of purchase-money by parties purchasing, and reserving further consideration.]

Solicitors: *J. S. Tyler; J. L. Higgs; Sims & Syms.*

C. C. M. D.

GEILINGER *v.* GIBBS.

KEKEWICH J.

1897

Feb. 2.

[1895 G. 2285.]

Practice—Costs—Unauthorized Use of Plaintiff's Name—Right of Defendants to apply for Payment of Costs by Solicitors.

Where an action is brought in the name of a person as plaintiff without his authority, and he subsequently repudiates the action, the defendants, on application in the action, may obtain an order for payment of their costs by the solicitors who issued the writ.

So *held*, in a case where an infant was joined as co-plaintiff by solicitors on the assumption that he was of full age.

Fricker v. *Van Grutten*, [1896] 2 Ch. 649, considered and applied.

Adjourned Summons.

This action was brought by Walter Geilinger and Bertie Hallett, as plaintiffs, against Frank Irons Gibbs and William Wright, as defendants, claiming by their writ, issued December 10, 1895, specific performance of an agreement for the sale and purchase of certain patents and patent rights, injunctions to restrain any sale of the patent rights by the defendants, and other incidental relief. The writ purported to be issued by Messrs. Williams & Neville as solicitors for the plaintiffs.

At the time when the writ was issued Geilinger was an infant, but Messrs. Williams & Neville were not aware of this fact, and issued the writ by the direction of his co-plaintiff Hallett, in the belief that Geilinger, who was stated to be Hallett's partner (but who appeared in fact to be his clerk), was of full age, and of course, therefore, without naming any person as his next friend.

Geilinger attained the age of twenty-one years on July 2, 1896, and on July 7, 1896, he took out a summons asking that his name might be struck out as a plaintiff in the action, and that his costs of and incident to that application, and any costs for which he might be liable to the defendants in the action, might be taxed and paid by Hallett or his solicitors, Messrs. Williams & Neville, on the ground that Geilinger was an infant at the date of the commencement of the action, and the action

KEKEWICH J. 1897 GEILINGER v. GIBBS.

was unauthorized by him. On this summons the chief clerk made an order striking out Geilinger's name as plaintiff, and directing that the plaintiff Hallett should pay the defendants' and (he consenting thereto) the applicant's costs of application.

On July 13, 1896, the present summons was taken out by the defendants asking that all their costs of and occasioned by the plaintiff Geilinger being made a party to the action, and the costs of this application, might be taxed and paid by his late solicitors, Messrs. Williams & Neville.

This summons was adjourned into court, and now came on for hearing.

The examination of the plaintiff Geilinger had been taken, and he deposed that he never gave instructions that his name should be used as plaintiff, and that he believed that his co-plaintiff Hallett gave instructions for the use of his name. He stated that he first heard of the action about December 13, 1895, and admitted that on several occasions subsequently to that date he was at the offices of Messrs. Williams & Neville.

Warrington, Q.C., and *Cave*, for the applicants, the defendants in the action. The plaintiff Geilinger being an infant, the solicitors, Messrs. Williams & Neville, must necessarily have acted without his authority. Consequently, according to the practice of the Court as now established by *Fricker* v. *Van Grutten* (1), *Nurse* v. *Durnford* (2), and *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (3), they ought to be ordered to pay to the defendants the costs occasioned to them by the unauthorized joinder of Geilinger as co-plaintiff.

Renshaw, Q.C., and *Eldon Bankes*, for the respondents, Messrs. Williams & Neville. The defendants are not entitled to make this application. In all the cases the application against the solicitor has been by the plaintiff who has been injured by the unauthorized use of his name. The decisions are based on the law of principal and agent, and proceed upon the principle that the person who has acted as agent without

(1) [1896] 2 Ch. 649. (2) (1879) 13 Ch. D. 764.
(3) (1879) 13 Ch. D. 310.

authority is bound to indemnify his assumed principal. The right is the right of the plaintiff, and not of the defendants, and upon an application by the defendants the Court has no jurisdiction to make an order against the solicitors in the absence of evidence of misconduct on their part.

[They further contended that it was competent for an infant to give an authority to his solicitors, and that the evidence shewed that Geilinger had given authority to the solicitors to use his name, or, at all events, had by his acts ratified their use of it, and referred to *Reynolds* v. *Howell* (1) and *Thomas* v. *Finlayson*. (2)]

Warrington, Q.C., in reply. The right of the defendants to make application for their costs as against the solicitors is the necessary result of the change which has been made in the practice. Formerly, in courts of equity the plaintiff whose name had been improperly used was in the first instance liable to pay the defendant's costs and had a right of indemnity against the solicitor, and therefore the defendant had no direct right against the solicitor. It was otherwise in the courts of common law, where it was held that the plaintiff in such a case was under no liability, and, accordingly, the defendant's remedy was against the solicitor. That is now the practice of all the courts. In *Nurse* v. *Durnford* (3) the application was by the defendants, and the argument was based on their right. The principle, as explained in *Fricker* v. *Van Grutten* (4), is that the solicitors who have improperly put forward the plaintiff as the person to pay costs are liable to indemnify the defendants against the consequences by paying the costs occasioned to them.

KEKEWICH J. The utmost that can be said against Messrs. Williams & Neville in their character of solicitors is that they trusted overmuch to the plaintiff Hallett, whom I suppose they had good reason for trusting, and that they did not, under the circumstances, take the extreme care which ought to be taken in joining a co-plaintiff with him; in other words, there is

(1) (1873) L. R. 8 Q. B. 398.
(2) (1870) 19 W. R. 255.
(3) 13 Ch. D. 764.
(4) [1896] 2 Ch. 649.

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nothing to be said against them professionally. It seems to me to be clear that they acted without authority in joining Geilinger as plaintiff, and the real question is whether they have thereby rendered themselves liable to the defendants for costs. [His Lordship referred to the facts of the case, and having observed that, as an infant must sue by a next friend, and cannot sue in his own name, he cannot give an authority to any one to sue in his name or ratify the acts of any one who does so sue, proceeded as follows:—]

It being, therefore, established that this action was, so far as Geilinger is concerned, brought wholly without his authority, the way is cleared for the main question, which is whether the solicitors for Geilinger ought to pay the defendants' costs. I take it that there is no question that if Geilinger, having been made plaintiff, was in any way liable, he would have a remedy over against his solicitors who acted for him. That is recognised in all the cases. But the question is whether the defendants have a right as against the solicitors to make them pay, and that depends on what is called more than once in *Fricker* v. *Van Grutten* (1) the "principle" of the cases on the subject. In *Reynolds* v. *Howell* (2) the Court (Blackburn and Archibald JJ.) decided that some preceding cases were erroneous and that the right principle was that the plaintiff, having been made plaintiff without his authority, was not liable to the defendant. The defendant might have some other remedy, but could not make the plaintiff pay the costs. The result was that an order went there, after serious consideration, that the action should be stayed without the plaintiff paying the costs of the defendants. It was insisted by the defendants that they were entitled to be paid costs by the plaintiff so long as he was plaintiff, that when he was struck out his liability was, of course, at an end, but that until then they were entitled to be paid by him. The Court decided otherwise, and the principle of the decision was discussed in *Fricker* v. *Van Grutten*. (1) The Court of Appeal in that case were not considering the question which I am considering here, and therefore their language does not touch this point; but I may refer to what Rigby L.J. says

(1) [1896] 2 Ch. 649. (2) L. R. 8 Q. B. 398.

in explanation (1): "Afterwards, Baron Parke, who was no mean authority, considered that the old decisions were more correct; but ultimately, in *Reynolds* v. *Howell* (2), the common law courts, under the guidance of Blackburn J., emancipated themselves from the old doctrine"—the old doctrine, that is, that the plaintiff must pay the costs so long as he remained plaintiff—"and adopted the principle of *Robson* v. *Eaton*. (3) That principle has since been applied in the Chancery Division in the two cases of *Nurse* v. *Durnford* (4) and *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (5), the latter of which was a decision of the Court of Appeal; and it was afterwards applied again in *Cape Breton Co.* v. *Fenn*. (6)"

The result is that the principle now established is not that the plaintiff is necessarily to pay the costs, but that the solicitors who have improperly made him plaintiff are to be substituted for him. As was said by Rigby L.J. in *Fricker* v. *Van Grutten* (1), the solicitor "having put forward Mr. Weller as one of the persons to pay the costs ordered to be paid by the plaintiffs, he must be substituted for Mr. Weller, and must pay the costs which Mr. Weller has been ordered to pay to the defendants." So in this case Messrs. Williams & Neville, having put forward Geilinger as one of the persons who ought to pay the costs of the defendants, and having no authority to do that, must be substituted for him and made liable to indemnify the defendants. But can that be done only at the instance of the plaintiff, or can the defendants apply, as they have done in this case? It seems to me that when once the principle is arrived at, it is clear that the defendants are entitled to make the application. The plaintiff was formerly entitled to apply for relief by way of indemnity, because he was under liability to the defendant, but now that there is no such liability there is nothing for him to apply for. But to stop short of the whole substitution of the solicitors for the plaintiff, and to say that the defendants are not entitled to any remedy, but that it can only be given at the instance of the plaintiff, would be to depart

(1) [1896] 2 Ch. 662.
(2) L. R. 8 Q. B. 398.
(3) (1785) 1 T. R. 62.
(4) 13 Ch. D. 764.
(5) 13 Ch. D. 310.
(6) (1881) 17 Ch. D. 198, 210.

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from the principle—to adopt it in part instead of in whole. I think that these applicants are right, and that Messrs. Williams & Neville must now be ordered to pay to the defendants their costs of the action so far as they are attributable to the infant plaintiff Geilinger having been made a party, and also their costs of this application.

Solicitors: *Hulberts, Hussey & Metcalfe, for Carr & Wilson, Birmingham; Williams & Neville.*

C. C. M. D.

KEKEWICH J. 1897 *Feb.* 3.

In re FOSTER. THOMAS *v.* FOSTER.

[1892 F. 1927.]

Revenue—Account Stamp Duty—Incidence—Gift within Twelve Months before Death of Donor—Residuary Estate and Donee—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *ss.* 38, 39—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-s.* 1.

Under the Customs and Inland Revenue Acts, 1881 and 1889, account stamp duty in respect of property given by a deceased person, within twelve months before his death, to another, is payable by the donee personally and not out of the estate of the deceased.

ADJOURNED SUMMONS.

Mary Foster, who died on November 14, 1892, had within twelve months previous to her death given a sum of 1700*l.* to her son Arthur Foster.

By her will she devised and bequeathed all her property (with the exception of certain specific articles) to her three children, Arthur Foster, Edith Margaret Thomas, and Florence Amelia Lacon, to be divided between them share and share alike, and appointed them executor and executrixes of her will.

In an action in which Edith Margaret Thomas was plaintiff and Arthur Foster, Florence Amelia Lacon, and another were defendants, the present summons was taken out by the plaintiff for the determination of various questions arising in the administration of the estate of the testatrix, and in particular for a

direction whether account stamp duty under the Customs and Inland Revenue Act, 1881, ss. 38 and 39, as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1), was payable in respect of the sum of 1700*l.*, so given to Arthur Foster, by him or out of the estate of the testatrix. The duty in question had not yet been paid.

George Henderson, for the plaintiff. By s. 39 of the Customs and Inland Revenue Act, 1881, liability to pay the duty in such a case as the present is clearly thrown upon the donee of the

(1) By the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, sub-s. 1, "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof."

Sub-s. 2: "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.: (*a*) Any property taken as a donatio mortis causâ made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased."

Sect. 39: "Every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or moveable property of a description to be included in an account according to the preceding section shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property duly stamped as required by this Act."

Sect. 40: "If any person .... who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to Her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties."

By the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11, sub-s. 1, "Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows: The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

KEKEWICH J.

1897

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property, who is required to deliver an account duly stamped. This sum of 1700*l.* has been segregated for the benefit of Arthur Foster from the rest of his mother's estate, and it is just and fair that the duty payable in respect of the money should be borne by him solely, and not by the estate, i.e., by him and the other two residuary legatees equally.

Warrington, *Q.C.*, and *E. Beaumont*, for the defendant Arthur Foster. We submit that the duty is payable out of the estate of the testatrix. The Act is intended solely for the protection of the revenue, and not to vary the rights of persons interested in the estates of testators or intestates. Accordingly the Act contains no provisions as to the persons by whom the duty is ultimately to be borne. The new duty is a substitute for the old probate duty, and, as shewn by *In re Bourne* (1), the principle is the same as with the old duty. In that case it was held that the new duty was not payable by specific legatees, but out of the general estate; and the effect of the Act is to place this donee in the same position as regards duty as if he were a specific legatee. Your Lordship's decision in *In re Croft* (2) proceeds upon the like principle, the intention of the appointor by will being there treated as the governing consideration. If the contrary view be adopted, then, if a testator gives a legacy to one son and makes a donatio mortis causâ of like amount to another son, the former would pay nothing, while the latter would have to pay estate duty on the amount. The Legislature cannot have intended such a result to follow. The object of the enactment was to prevent a testator or intestate from evading payment of duty by parting with his property in his lifetime, and to that end the new duty has been substituted for the probate duty.

G. Henderson, in reply. It is inaccurate in this case to speak of the estate duty as being "substituted" for the probate duty. Before the Act of 1881 no duty was payable in respect of property such as that in question. It is clear that under s. 39 the obligation of bringing in an account duly stamped is imposed on the donee; in order to do that he must pay the stamp duty, and, having so done, it is impossible to see what right of action

(1) [1893] 1 Ch. 188. (2) [1892] 1 Ch. 652.

to recover the amount he can have as against the legal personal representatives of his donor.

KEKEWICH J. 1897 *In re* FOSTER. THOMAS *v.* FOSTER.

KEKEWICH J. It seems to me that this case is one which is not covered by authority. *In re Croft* (1), decided by myself, has been cited, but seems to me to have nothing to do with the present case. In the last edition of the work now known as Hanson's Death Duties, at p. 379, the principle on which *In re Croft* (1) was decided is accurately stated; and it is shewn also by the distinction taken in reference to it by Stirling J. in *In re Bourne* (2), which case also seems to me to have nothing to do with the present case, except for the observation of Stirling J. in the passage at p. 192, which has been cited: "In this Act" (i.e. the Act of 44 & 45 Vict. c. 12) "there is not to be found, any more than in the Probate Duty Acts, any intimation as to how the probate duty is to be paid." There is no doubt that it was not intended by the Act to decide questions between different parties. The object of the Act is to provide for levying duty for the Inland Revenue, and in an Act of that kind one does not expect to find rules as to administration of estates laid down, and as a matter of fact no such rules are laid down. But the 38th section of the Act imposes a new duty on property which up to that time had not been subject to duty, namely, property taken as a donatio mortis causâ, or, in certain cases, under a voluntary disposition purporting to operate as an immediate gift inter vivos. Before the Act a man who gave property to his child gave it out and out; there was so much less to pass by his will and to form part of his estate at his death. Now the duty is imposed, and it is enacted that property of the kind indicated shall bear the duty. But for the present purpose I think that is all that s. 38 says. This property is to bear duty; stamp duties at certain rates are to be charged, but it is not said by whom they are to be paid. If the matter rested there the result would apparently be that the testator's estate would bear the duty, because although the property has gone away from the estate, yet duty is to be paid in respect of it, and no liability to pay such duty has been

(1) [1892] 1 Ch. 652. (2) [1893] 1 Ch. 188.

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imposed on the donee. But then s. 39 provides that every person who as beneficiary, trustee, or otherwise acquires possession of the property must within a certain time deliver to the Commissioners of Inland Revenue an account of such property duly stamped. That, no doubt, is a protection to the Crown, in order that the Inland Revenue may not suffer by a man giving all his property away; so that, notwithstanding that within a year before his death he was possessed of property on which duty would have been payable, there is nothing at his death on which duty can be levied. The Crown is protected there by the direction that the donee is to deliver an account. But then it is further required that the account is to be duly stamped, and the obvious result is that the person who brings in the account must pay the stamp duty, and that the liability to bring in the account must carry with it the liability to pay the duty. If the donee renders the account and pays the duty, what right of action can he possibly have against the estate? I can see no law or equity in his favour. He has paid the duty which the Act imposes, and there is no provision in the Act that he should have a right over against the residuary legatee. Whether if the duty were paid out of the estate in the first instance, there could be any right of action by the residuary legatee against the donee is a point which may possibly deserve further consideration when it arises; but as regards the liability to pay under the Act of 1881, which is the question for my decision, I am of opinion that the donee is liable, and the residuary estate is not liable.

Solicitors: *Hunters & Haynes; Fladgates.*

C. C. M. D.

PRIESTLEY *v.* ELLIS.

KEKEWICH J.

1897

Feb. 9, 10.

[1896 P. 453.]

Settlement—Trust for Payment of Debts—Unnamed Creditors—Agency—Revocable Trust—Death of Settlor—Liability of Estate—Charge of Debts.

By a deed of "family arrangement" executed in 1867 on the resettlement of an estate by father and son, the estate was limited to the use of the father for life, with remainder to the use of trustees, upon trust, with the consent of the father and son during their joint lives, or of the survivor during his life, and after the death of the survivor at the discretion of the trustees, to sell the same and apply the proceeds, and also the rents and profits until sale, in payment, in such order and in such manner as the trustees should, with the concurrence of the father during his lifetime, determine, of all debts owing by the father; and subject thereto to hold any unsold hereditaments to the uses of an indenture of even date under which the father and son were successive tenants for life with remainder to an infant son of the son in tail. The father's creditors were neither parties to nor named in the deed, nor was it ever communicated to them. After the father's death the trustees sold part of the settled estate with the consent of the son, and applied the proceeds in payment of all the father's debts, except one due to a sister, of which the trustees were unaware. In 1889 the trustees, with the concurrence of the son, who was his father's legal personal representative, conveyed the unsold hereditaments to the uses of the second indenture of 1867. The son died in 1890. In 1896 the executors of the sister, who had died, having become aware of the deeds of 1867 and 1889, brought an action seeking to charge the hereditaments in the possession of the infant tenant in tail with the debt due to the sister's estate:—

Held, that the case fell within the principle of *Synnot* v. *Simpson*, (1854) 5 H. L. C. 121, and not within that of *Garrard* v. *Lord Lauderdale*, (1831) 2 Russ. & My. 451, and that the infant tenant in tail took the estate subject to the liability for the debt.

UNDER a disentailing assurance of October 15, 1867, executed by Richard Lloyd-Edwards as tenant for life and his only son Francis Lloyd-Edwards as tenant in tail, the two had a joint power of appointment by deed over a settled estate in the county of Carnarvon called the Nanhoron estate.

By an indenture dated the following day, October 16, 1867, and made between Richard Lloyd-Edwards of the first part, Francis Lloyd-Edwards of the second part, and J. G. W. Griffith and H. J. E. Nanney of the third part, after reciting

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(amongst other things) that the said Richard Lloyd-Edwards and Francis Lloyd-Edwards "had agreed, as part of a family arrangement between them," that the hereditaments and premises thereinafter described should be appointed upon the trusts thereinafter declared, and also reciting the disentailing deed of the previous day: It was witnessed that in pursuance of the said agreement, and in consideration of the premises, and in exercise of the power given to them by the disentailing deed, the said R. Lloyd-Edwards and F. Lloyd-Edwards thereby appointed that the hereditaments and premises therein described, and containing forty-nine different lots, being part of the Nanhoron estate, should immediately after the execution thereof, but subject and without prejudice to such charges and incumbrances as were then subsisting thereon, remain to the use of the said R. Lloyd-Edwards during his life, and after his decease to the use of the said Griffith and Nanney, their heirs and assigns, upon trust that they and their assigns, or other the trustees thereof (thereinafter called the trustees or trustee) should, with the concurrence of the said R. Lloyd-Edwards and the consent in writing of the said F. Lloyd-Edwards during their joint lives, and with the concurrence or like consent (as the case might be) of the survivor of them during his life, and after the death of the survivor at the discretion of the trustees, sell the said hereditaments, or any part thereof respectively, in manner therein mentioned, and should stand possessed of the moneys to arise from any such sale, and also of the rents and profits thereof until such sale (and which said moneys, rents, and profits were thereinafter referred to as "the trust funds"), in trust, in the first place to pay or retain thereout all costs, charges, and expenses of and incident to any such sale, or otherwise incurred in the execution of the trusts thereby declared, and in the next place to pay in such order and in such manner as the trustees or trustee should, with the concurrence, during his lifetime, of the said R. Lloyd-Edwards, order and determine, all debts or sums of money which should from time to time during the lifetime of the said R. Lloyd-Edwards, or at the time of his decease, be due and owing from the said R. Lloyd-Edwards upon specialty, simple contract, or

otherwise, to any person or persons whosoever, and all interest and arrears of interest due in respect thereof; and after satisfying all the trusts aforesaid should stand possessed of the surplus which should remain of the said trust funds, and also of so much of the said hereditaments as should then remain unsold, as to such surplus funds upon trust to pay over the same to the trustees for the time being of the next thereinafter-mentioned indenture, to be held by such trustees upon the trusts and subject to the powers and declarations upon and subject to which such surplus trust funds would be held in case the same were moneys arising from any exercise of the powers of sale and exchange contained in a certain indenture of settlement bearing even date with the present indenture and made between the said R. Lloyd-Edwards of the first part, the said F. Lloyd-Edwards of the second part, and two trustees of the third part, and as to such unsold hereditaments and premises upon trust to convey the same to the last-mentioned trustees, to the uses, upon the trusts, and subject to the powers and declarations in and by the same indenture expressed and declared concerning the several hereditaments thereby appointed, or such of them as should then be subsisting or capable of taking effect, but not so as to increase or multiply charges or powers of charging. And it was thereby provided that the trustees or trustee should stand possessed of the said hereditaments upon trust to permit the rents and profits thereof, or of any portion thereof for the time being remaining unsold (after providing for the payment of the interest upon any mortgages), to be received by the person or persons for the time being entitled to the receipt of the rents and profits of the hereditaments comprised in the said indenture of settlement as tenant for life or in tail under the limitations of the said settlement. And the present indenture contained a proviso that nothing therein contained should be construed to give any annuitant, mortgagee, or other incumbrancer, any further or other charge, lien, or security than was subsisting before the execution of such indenture.

Under the limitations of the settlement referred to in the last-stated indenture, Richard Lloyd-Edwards was then legal

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tenant for life, with remainder to the use of Francis Lloyd-Edwards for life, with remainder to the use of his first and other sons in tail, with remainders over.

The object of the resettlement or deed of "family arrangement" of October 16, 1867, was to provide means for payment of debts then due from Richard Lloyd-Edwards to various creditors, but the existence of the deed was not communicated to any of the creditors. Among the debts then owing from him were several sums, amounting in all to 2266*l.*, due to his sister Catherine Wynne-Edwards, but it did not appear that she was ever consulted upon the subject of the deed, or that the existence of the deed was ever communicated to her. None of the hereditaments comprised in the deed of arrangement were sold in Richard's lifetime, and he died on January 18, 1876, having made a will dated December 22, 1875, whereby, subject to certain annuities charged thereon, he devised all his real estate to his son Francis in fee, and bequeathed his residuary personal estate, subject to the payment of his debts, to Francis absolutely, and appointed him and two other persons his executors, but the will was proved by Francis alone, on February 8, 1876. At the time of his death Richard was indebted in a considerable amount to creditors, including his sister Catherine Wynne-Edwards.

In August, 1888, the trustees of the deed of arrangement, acting under their trust for sale, and with the consent of Francis, sold part of the hereditaments comprised in the deed, and out of the proceeds paid all Richard's debts, except the debt to Catherine Wynne-Edwards, of which they were then unaware.

By an indenture dated November 12, 1889, and made between Griffith and Nanney, the trustees of the deed of arrangement of October 16, 1867, of the first part, Francis Lloyd-Edwards of the second part, and the defendants, B. T. Ellis and O. L. J. Evans, the then trustees of the settlement of October 16, 1867, mentioned in the deed of arrangement, of the third part, after reciting that part of the hereditaments comprised in the deed of arrangement had been sold, and that out of the proceeds all moneys which under the trusts of that deed

were payable in respect of the debts of Richard Lloyd-Edwards had been paid: It was witnessed that Griffith and Nanney thereby conveyed such of the hereditaments comprised in the deed of arrangement as then remained unsold (but subject and without prejudice to such charges and incumbrances as were then subsisting upon the same) unto the defendants Ellis and Evans and their heirs, to the uses and upon the trusts and subject to the powers and declarations in and by the said settlement expressed and declared concerning the several hereditaments thereby appointed and then remaining unsold (but subject and without prejudice to such charges and incumbrances as were then subsisting upon the same) unto the defendants Ellis and Evans and their heirs, to the uses, upon the trusts and subject to the powers and declarations in and by the said settlement expressed and declared concerning the several hereditaments thereby appointed, or such of them as were then subsisting and capable of taking effect, but not so as to increase or multiply charges.

Francis Lloyd-Edwards, by his will dated February 16, 1876, appointed the plaintiff William Thomas Trench, and three others, his executors. He did not thereby dispose of his real estates otherwise than by charging them with the payment of four annuities. He died on January 20, 1890, leaving his only son, the defendant Claude Lloyd-Edwards, an infant, his heir-at-law. In the events which had happened the hereditaments comprised in the settlement of October 16, 1867 (referred to in the deed of arrangement of the same date), now stood limited to the use of the infant defendant Claude Lloyd-Edwards as tenant in tail general, with remainders over. The will was proved by the plaintiff Trench alone, who thus became also the legal personal representative of Richard Lloyd-Edwards.

Catherine Wynne-Edwards died on February 13, 1890, having by her will, dated February 8, 1890, appointed the plaintiffs, Henry Samuel Priestley and Christopher Fearne Priestley, her executors, both of whom duly proved the will.

In 1891 the executors of Catherine Wynne-Edwards commenced an action for the administration of Richard Lloyd-Edwards' estate, claiming payment out of that estate of the

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debt due to their testatrix, and judgment for administration of the real and personal estate of Richard was pronounced in the usual form on February 16, 1893.

On July 13, 1893, the chief clerk certified in that action that the only debt of Richard which had been allowed was that of the plaintiffs in that action and amounted, with interest, to 2302*l.*; that the sum of 3958*l.* ought to be accounted for by the estate of Francis as personal estate of Richard which came into the hands of Francis as Richard's sole executor; and that the only personal estate of Richard outstanding or undisposed of, other than the 3958*l.*, was the sum (if any) raisable under the trusts of the deed of arrangement of October 16, 1867, and consequently the inquiries as to real estates had not been proceeded with.

On June 27, 1894, the chief clerk, by his certificate in an action which had been commenced in 1890 for the administration of the estate of Francis, found that the 3958*l.* was due to Trench as Richard's legal personal representative, and that four properties therein described were inherited by Francis from Richard, and were subject to Richard's administration action; and he included, as part of Francis's outstanding personal estate, a claim of indemnity out of the real estate comprised in the deed of arrangement of October 16, 1867, and the conveyance of November 12, 1889, in respect of any sum payable out of the estate of Francis for the payment of the debts of Richard.

Under an order on further consideration, dated October 24, 1894, in Francis's administration action, Trench, as Richard's legal personal representative, received a sum of 1283*l.*, and paid it into court to the credit of Richard's administration action; and under an order made on January 16, 1896, in Richard's administration action, the balance of the fund, after providing for costs, was paid out to Catherine Wynne-Edwards' executors, thereby reducing the debt due to her estate to 1719*l.*

On February 19, 1896, the writ in the present action was issued by the plaintiffs H. S. Priestley and C. F. Priestley, as Catherine's executors, and by the plaintiff, Trench, as Richard's legal personal representative, against the defendants Ellis and

Evans, as the trustees of the settlement of October 16, 1867 (referred to in the deed of arrangement of the same date), and of the conveyance of November 12, 1889, and against the defendant Claude Lloyd-Edwards, the infant son and heir-at-law of Francis, claiming that such a sum as should be required for the payment of the outstanding debt of 2302*l.* due from Richard's estate to Catherine's, or of so much thereof as might still remain unpaid, together with interest and the costs of the present action, might be raised out of such parts of the hereditaments comprised in the deed of arrangement of October 16, 1867, as were conveyed to the defendants Ellis and Evans by the deed of November 12, 1889, and be paid to the plaintiffs; and, so far as might be necessary, execution of the trusts of the said deed of arrangement.

By the statement of claim the plaintiffs, the Priestleys, submitted that those hereditaments were still subject to the trusts of the deed of arrangement for payment of Richard's outstanding debts, and were charged with the payment of the balance of the debt due to Catherine's estate, together with interest and costs: and the plaintiff Trench also submitted that the same hereditaments were expressly charged with the whole of the said debt, interest and costs in exoneration of Richard's real and personal estate, and that the sum raisable under the trusts of the deed of arrangement was payable to him as Richard's legal personal representative for the purpose of paying the whole of the debt, interest and costs.

By their defence the defendants Ellis and Evans alleged that the so-called deed of arrangement was a voluntary instrument, and that the contents thereof were not communicated to Catherine, or to any other creditor of Richard; and they submitted that the trusts of the deed were not enforceable by Catherine or her representatives; that, by Richard's bequest of his residuary personal estate expressly subject to the payment of his debts, the hereditaments comprised in the deed of arrangement were exonerated from all liability (if any) under that deed for payment of his debts, or that his debts became payable in priority out of his residuary personal estate; and that the effect of the conveyance of November 12, 1889, was to

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discharge and release the hereditaments comprised therein from all claims (if any) of any creditor of Richard. And they pleaded the provisions of the Real Property Limitation Act, 1874.

The infant defendant, Claude, alleged in his defence that the so-called deed of arrangement did not purport to have been made, and in fact was not made, as part of any agreement with, or for any consideration moving from, and was never communicated to, Catherine or any other creditor of Richard, but was in fact, as it recited, part of a "family arrangement" only, and was not enforceable by any creditor of Richard; that the trustees of that deed did not, during Richard's lifetime, either with or without his concurrence, make any order or determination with regard to the payment of the debt due to Catherine or of any other of Richard's debts; that, having regard to the terms of Richard's residuary bequest, his debts were, after his death, payable out of his personal estate primarily and in exoneration of the liability of any of the lands comprised in the deed to be sold to raise such debts, and that neither Richard's estate nor Francis's was entitled to any indemnity out of his, the infant's, settled estate. The infant also claimed that, under the circumstances, he and the other persons interested in the settled estate were entitled to indemnity out of Richard's residuary personal estate, and also (so far as Francis's estate was indebted to Richard's estate) out of Francis's estate in respect of, as well all sums which had already been raised, as also all sums (if any) which thereafter should be raised, out of the settled estate and applied in payment of any of Richard's debts. And he submitted that the effect of the conveyance of November 12, 1889, was to discharge and release the settled estate from all further claims (if any), whether of any creditor of Richard's or Francis's estate, and whether personally or as executor of Richard, to have any then outstanding debt of Richard raised and paid out of the settled estate. He also pleaded the Statutes of Limitations. In their reply the plaintiffs joined issue with the defendants, and stated that interest on Catherine's debt was duly paid to her by Richard during his life, and after his death by Francis until the latter's death in 1890.

The action now came on for trial.

Renshaw, Q.C., and *F. T. Procter*, for the plaintiffs. This case does not fall within *Garrard* v. *Lord Lauderdale* (1) and *Walwyn* v. *Coutts* (2), the principle of which cases was that creditors are not cestuis que trust under, and therefore capable of enforcing, a deed executed by the debtor without bargain or communication with the creditors and vesting his property in trustees for the purpose of discharging his debts. In such a case the trustees are mere agents for the debtor: there is no privity between those agents and the creditors; and the debtor may at any time revoke the authority given to his agents. The principle of *Garrard* v. *Lord Lauderdale* (1) is fully explained by James L.J. in *Johns* v. *James*. (3) This case falls within another class of authorities altogether, illustrated by *Synnot* v. *Simpson* (4), a case which decides that where, as here, the trust for payment of debts is to come into operation only on the death of its author, the property charged can only come to the ultimate taker as it was given to him, that is, subject to the payment of the debts. Here the author of the trust was Richard, and it was only to come into operation after his death: therefore, according to *Synnot* v. *Simpson* (4), the defendant, the infant tenant in tail, can only take subject to the liability of satisfying Richard's debts. It has been expressly laid down by the Court of Appeal in *In re Fitzgerald's Settlement* (5) that the doctrine of *Garrard* v. *Lord Lauderdale* (1) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *Frewen* v. *Law Life Assurance Society* (6), and also the reasoning in *Godfrey* v. *Poole* (7), are in favour of our contention that, the deed of arrangement having become irrevocable by the death of the settlor Richard, and also having already been acted upon, the trust for payment of his debts is binding on the settled estate. We say therefore, first, that

(1) 2 Russ. & My. 451.
(2) (1815) 3 Sim. 14; 3 Mer. 707.
(3) (1878) 8 Ch. D. 744.
(4) 5 H. L. C. 121, 141.
(5) (1887) 37 Ch. D. 18.
(6) [1896] 2 Ch. 511, 518-9.
(7) (1888) 13 App. Cas. 497, 502.

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where, as here, trusts are declared, subject to the payment of debts, for other beneficiaries after the death of the settlor, the settlement is not revocable but binding upon the settlor and all persons taking under the settlement, and that the trusts of it can be enforced by creditors; and, secondly, that here, as in *Synnot* v. *Simpson* (1), the tenant in tail comes in under the trust for creditors and can only take what is given to him, namely, the estate subject to the debts.

Warrington, Q.C., and *Robertson-Macdonald*, for the defendants, Ellis and Evans, the trustees of the settlement of 1867, referred to in the deed of arrangement, and of the conveyance of 1889.

[KEKEWICH J. The only question is whether the case comes within the principle of *Garrard* v. *Lord Lauderdale* (2), or within the exception to that principle in *Synnot* v. *Simpson* (1) and *In re Fitzgerald's Settlement.* (3)]

Our contention is that this case is within the principle of *Garrard* v. *Lord Lauderdale.* (2) Was the effect of the deed of arrangement to make the creditors beneficiaries under that deed, or was the deed intended for the benefit of the father and son, or of the father alone? The deed was part of an arrangement for the resettlement of the family estate by the father and son. The resettlement was not by the father alone, but by the father and son, and the substance of the arrangement between them was that the son consented to such part of or interest in the estate as belonged to him as tenant in tail being applied in payment of the father's debts, so that the arrangement was really for the benefit of the father. There was no intention to make the creditors cestuis que trust. The persons who under the deed of arrangement took subject to the trust for payment of debts, namely, Richard, Francis, and Claude the first tenant in tail, took, not by the bounty of any one, but by virtue of the resettlement of the family estate.

In *Synnot* v. *Simpson* (1) Lord St. Leonards not only differed from Lord Cranworth, but said (4) that he considered the case

(1) 5 H. L. C. 121.
(2) 2 Russ. & My. 451.
(3) 37 Ch. D. 18.
(4) 5 H. L. C. 150.

stood by itself and depended upon special circumstances; and further, payment of interest on the debts was continued after the death of the first tenant for life by the parties interested in the settled estate, thus affirming the trusts.

[KEKEWICH J. In *Montefiore* v. *Browne* (1) Lord Cranworth stated what he meant in *Synnot* v. *Simpson*. (2)]

Montefiore v. *Browne* (1) was stronger than *Synnot* v. *Simpson* (2), for the creditor claiming was a party to the deed. As in *Walwyn* v. *Coutts* (3), the deed in the present case was a mere voluntary trust deed for the payment of creditors, which might at any time be varied or revoked by the settlors. Here we say that not only could Richard and Francis have revoked this deed, but that the deed was in fact revoked. Richard himself did not revoke it, but Francis, as executor of Richard and also as tenant in possession, revoked it by executing the conveyance of 1889. As to the argument that this case comes within *In re Fitzgerald's Settlement* (4) because the trust is to be executed after the death of Richard, the trust is one that according to the terms of the deed might in fact have been executed in his lifetime. Upon the whole we submit that the trust for payment of debts is now gone.

W. B. Heath, for the infant defendant. The deed of 1867 was, as is expressed on the face of it, a "family arrangement"; the creditors were not parties to or cognizant of it, and none of them could enforce it. Francis was as much a settlor as Richard, and in fact had a larger interest in the estate, and was therefore himself entitled to treat the deed as one of agency only, and therefore not enforceable by creditors. Again, after Francis's death the trustees had nothing more than a discretion as to the payment of Richard's debts.

F. T. Procter, in reply. Trustees have no equity to disregard their trusts, where they are clearly declared, at the instance, not of the settlor, but at the instance of a person who claims from the bounty of the settlor: per Cotton L.J. in *In re Fitzgerald's Settlement*. (5)

(1) (1858) 7 H. L. C. 241, 266.
(2) 5 H. L. C. 121.
(3) 3 Sim. 14; 3 Mer. 707.
(4) 37 Ch. D. 18.
(5) 37 Ch. D. 24.

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KEKEWICH J. The question which falls for decision may fairly be stated thus: Is this case within the principle of *Garrard* v. *Lord Lauderdale* (1), or is it within the exception to that principle illustrated by the case of *Synnot* v. *Simpson*? (2) I refer to *Garrard* v. *Lord Lauderdale* (1) for the principle there stated, although it is a case by no means standing alone, nor was it the first case affirming the principle, because it was laid down by Lord Eldon in the case of *Walwyn* v. *Coutts* (3), which was affirmed in *Garrard* v. *Lord Lauderdale* (1); and, again, in many subsequent cases, especially in the well-known case of *Acton* v. *Woodgate*. (4) Again, *Synnot* v. *Simpson* (2), if it does not stand alone—and I am not prepared to say it does not—may yet fairly be treated as constituting a class by itself, and as illustrating the principle of *Garrard* v. *Lord Lauderdale* (1) in this way, that it shews what are the limits of the application of that principle and of some of the cases to which it does not extend.

In order to decide this case, I have to consider what that principle is. Fortunately I am not here dealing with a question which has been raised more than once, and on which different opinions have been expressed, namely, whether, by specifying creditors or by communicating to them the provisions made in their favour, a binding trust is created or not; and, as regards *Garrard* v. *Lord Lauderdale* (1), it is only necessary to bear in mind the principle and broad lines on which it was decided. Not only are they to be found stated in the judgment of Shadwell V.-C. (5), and in the judgment of the Lord Chancellor affirming it (and also in the other cases I have mentioned, *Walwyn* v. *Coutts* (3) and *Acton* v. *Woodgate* (4)), but they have been expounded again by Lord Cranworth in moving the judgment of the House of Lords in *Synnot* v. *Simpson*. (2)

Without pretending to improve on what is so well stated by Lord Cranworth, I will, for the purposes of this case, venture to state the principle in my own language. A debtor, minded

(1) 2 Russ. & My. 451.
(2) 5 H. L. C. 121.
(3) 3 Sim. 14; 3 Mer. 707.
(4) (1833) 2 My. & K. 492.
(5) (1830) 3 Sim. 1.

to provide for his creditors, and to that intent vesting the property in another with directions to apply it in payment of his debts, does not thereby constitute an irrevocable trust, at all events during his life. The trustee is only his agent for effecting his wishes and is responsible only to him. The distinction between such a case as *Synnot* v. *Simpson* (1) and *Garrard* v. *Lord Lauderdale* (2) is precisely stated by Lord Cranworth in a passage of his speech in *Montefiore* v. *Browne*. (3) He says: "This case can hardly be distinguished in principle, or indeed in the very facts upon which the principle rests, from that of *Synnot* v. *Simpson* (1), in this House. There, as here, a conveyance was made of estates, creating, in terms at least, a trust for creditors who were not in that case parties to the deed, and subject to this trust there was a settlement for the mutual benefit of the father and the son. And what your Lordships then held was this, that at all events after the death of one of the parties to that arrangement that trust became an absolute trust, which the creditor, in whose favour it was made, might insist upon being enforced." The present case differs in some details from the case of *Synnot* v. *Simpson* (1) as there described by Lord Cranworth; but the question is whether, notwithstanding these differences of detail, it does not really fall within that case. In *Synnot* v. *Simpson* (1) there was a bargain: it was a settlement by father and son, and that is also the case here. It cannot be important to consider whether a given settlement was made by a single settlor, or by two or more settlors, or whether it was the result of a bargain as between themselves for their mutual interest or not. Nothing possibly, it seems to me, can turn on the consideration whether the two settlors, if there were two, were tenants in common with a joint power of appointment, or whether one was a particular tenant and the other a remainderman or not. The two persons together had the estate originally, and the two together were competent, by virtue of that ownership, to dispose of it as they pleased, that is to say, as they might contract by bargain between them. As regards the creditors, it cannot make any

(1) 5 H. L. C. 121. (2) 2 Russ. & My. 451.
(3) 7 H. L. C. 266.

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difference whether there was a bargain or not. Lord Cranworth, in his speech in *Synnot* v. *Simpson* (1), I think shews his opinion on page 141. He there, without deciding the point, says that he doubts "whether the doctrine acted on in *Garrard* v. *Lord Lauderdale* (2), and in the other authorities which I have adverted to, applies to a case where the trust is to come into operation only on the death of its author, and where, subject to the trust for payment of debts, the lands charged are conveyed by way of bounty to a third person. I think it at all events open to argument that in such a case the settlor must primâ facie be understood to be dealing with his property as if he was disposing of it by will, and therefore as contemplating bounty throughout; or if it be contract, so far as the party taking the estate is concerned, I think it must still be construed as bounty in favour of the plaintiffs named as incumbrancers." Therefore I understand Lord Cranworth to be distinctly of opinion that it makes no difference whether the case is to be regarded as one of bargain between the two or of bounty from one. That commends itself to my mind as being according to principle. The bargain is not with creditors: they are equally strangers, whatever might have been the reason for the disposition. It is a matter of moment as regards the other parties, but cannot give the creditors any rights which they otherwise would not have.

Having now, I think, sufficiently shewn the difference between the two cases of *Garrard* v. *Lauderdale* (2) and *Synnot* v. *Simpson* (1) as far as is necessary to this case, let me apply that to the facts before me. Here there were two gentlemen, Richard Lloyd-Edwards and Francis Lloyd-Edwards, father and son, deriving their power of dealing with this estate under a settlement which had been put an end to by a disentailing assurance for the purpose of resettlement, so that they had a general power of appointment; and it was intended, subject to such disposition as they might presently make, to resettle the estate on the family. In 1867, by a deed of family arrangement, a trust is created. That trust, which is expressed in a rather confused manner, is to sell either immediately or after the death of

(1) 5 H. L. C. 121. (2) 2 Russ. & My. 451.

Richard, but, if in his lifetime, with his consent, and out of the proceeds of sale to pay the debts of Richard; but the debts are not only charged (if there is a charge at all) on the proceeds of sale, but also on the rents and profits until sale; so that there is a charge on the corpus of the unsold estates as much as on the proceeds of sale. Subject to that, and subject to Richard Lloyd-Edwards' own life interest, the property is settled, by reference to another deed, on Francis for life, with remainders over under which the son of Francis now claims. The result is that it seems to me to bring it in terms (subject to two observations) within *Synnot* v. *Simpson* (1) as described by Lord Cranworth.

The two observations are these. First, this might have been put an end to by Richard and Francis, and, it is argued, in substance was put an end to by them; secondly (and this is a small point), that the creditors there described were not necessarily creditors to be ascertained at the death of Richard only, but creditors during his life or subsequently. That is a distinction in terms between this case and that of *In re Fitzgerald's Settlement* (2), because there it appears that the creditors were to be ascertained after the death of the settlor. To my mind that cannot make any difference: I think that is a mere distinction of words; and, there being a provision here for the payment of creditors either during Richard's life or after his decease, you have a trust—if it be a trust at all—for the creditors at the time of his decease. That brings the case, as far as this point is concerned, within *Synnot* v. *Simpson* (1) and not within *Garrard* v. *Lord Lauderdale*. (3)

The other point deserves more consideration. The two donors—the two settlors—were, as I have mentioned, Richard and Francis. It is quite possible—I am not expressing an opinion one way or the other—that they might have had power to cancel this provision for creditors during the joint lives, to oust or defeat such title as the creditors had, if they had a title at all, and so assure the estate to the uses coming in subsequently to that provision for the creditors. That point I must

(1) 5 H. L. C. 121. (2) 37 Ch. D. 18.
(3) 2 Russ. & My. 451.

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leave open, as I gather Lord Cranworth did in *Synnot* v. *Simpson*. (1) It does not arise, because Richard died without any attempt to revoke the deed; and the result was that Francis took the estate under the deed, and the defendant, his son, also takes the estate now under the deed. I think, therefore, it is decided by *Synnot* v. *Simpson* (1), according to the passage I have read, that the infant defendant now takes, and Francis before him took, the estate subject to the claim of the rights of the creditors under the trust, unless it could be said that the trust has been revoked by reason of the later deed of 1889, whereby Francis attempted to dispose of the property and ousted or defeated the plaintiffs. Francis was at that time owner or tenant of the estate in possession under the settlement of 1867. He was also executor of Richard; and it was said that, acting in both characters, he could do that which could have been done (if at all) by Richard and Francis during their joint lives. No authority has been cited to support any such proposition, and it seems to me entirely unfounded. The power—if there was a power—in the two, a point which I have left open, was a power vested in them because they were settlors, on the principle that, having provided that property should, subject to a charge for debts, go in a certain way, and assuming that the charge of debts was revocable by the two, they could concur in resettling the estate so as to defeat the creditors: that is to say, sweep away the provision for the payment of debts. But a power of that kind is not exercisable by an executor: it was exercisable (if at all) by the two joint settlors; and immediately Richard died the estate of Francis became an estate in possession by virtue of the deed; and, notwithstanding he was executor, it seems to me to be contrary to every principle to say that he could exercise, in his double character, the power vested in him and in Richard as a joint power.

That seems to me to be distinctly following what Lord Cranworth says; and on this ground I think that the argument on the part of the defendants cannot be upheld. I must therefore hold that this case is within *Synnot* v. *Simpson* (1), and that

(1) 5 H. L. C. 121.

there was a trust created in favour of Richard's creditors which, whatever might have been the case in Richard's lifetime, became irrevocable on his death.

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There will be a declaration that the sum remaining due to the plaintiffs, with interest, is, by virtue of the deed of 1867, charged on the estate therein comprised, and an order to raise the same, together with the costs of this action, by application in chambers, either by sale or mortgage. I say nothing as to the claim raised by the infant to be exonerated out of Richard's or Francis's estates; that is not a question which can properly arise before me in this action. Many questions may arise in the administration of those estates; but now I am only deciding the rights of the plaintiffs in this action.

Solicitors: *Ullithorne, Currey & Currey, for J. Rice Roberts & Laurie, Llangefni; Robbins, Billing & Co., for C. Owen, Pwllheli; Western & Sons.*

G. I. F. C.

MADELEY *v.* ROSS, SLEEMAN & CO.

KEKEWICH J.
1897
Feb. 10.

[1895 M. 1874.]

Procedure — Company — Debenture-holder's Action — Shareholder Plaintiff — Judgment—Certificate—Uncalled Capital—Liability of Plaintiff.

In an action against a limited company by one debenture-holder on behalf of himself and all other debenture-holders, the chief clerk may, under an inquiry directed by the judgment as to the property charged by the debentures, find what uncalled capital is due from the several shareholders (where uncalled capital is part of the security), notwithstanding that no calls can actually be made in such an action; and where the plaintiff is himself a shareholder and is found indebted in a sum of uncalled capital, he, being a party to the action, is bound by that finding, unless varied by the judge, the Court having jurisdiction to decide in that action the question of the plaintiff's liability without leaving it to be decided by other proceedings.

THE defendants, Ross, Sleeman & Co., Limited, were incorporated on May 7, 1892, under the Companies Acts, 1862 to 1890, for the purchase of the property and assets of an old company called "Ross & Sleeman, Limited," which carried on the business of maltsters, millers and flour merchants at Taunton,

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Somerset, and also to carry into effect an agreement dated May 10, 1892, for the sale of the business of the old company to the new: and it was thereby provided (clause 7) that, as part of the consideration for the sale, every member of the old company should be entitled to require the new company to allot to him or to his nominee fully paid-up shares in the new company to at least the amount actually paid up by such member on his existing shares in the old company; and that each shareholder of the old company should, and each shareholder signing the agreement bound himself to, take up fully paid-up shares in the new company to the amount of the money value of his shares in the old company not exceeding the amount paid up thereon. The agreement was not filed with the Registrar of Joint Stock Companies until December 19, 1892. William Madeley, a director of the old company, was a shareholder in it to the extent of 2680*l.*, being the holder of 268 shares of 10*l.* each, fully paid up; he was also a director of the new company, and he signed the agreement as confirming the same. He was moreover a subscriber to the memorandum of association of the new company for one 10*l.* share, though it appeared never to have been formally issued to him. Under the agreement the new company issued to Madeley 268 fully paid-up 10*l.* shares representing a sum of 2680*l.* Madeley afterwards died, being then the holder of the 269 shares, and also of first mortgage debentures of the new company for 2300*l.* charged on the undertaking and property of the company, including uncalled capital. He left his widow Emma Madeley his sole executrix and universal legatee.

In 1895 Mrs. Madeley commenced an action in the Manchester District Registry against the new company, on behalf of herself and all other the debenture-holders of that company, to enforce the debenture debt, and on March 7, 1895, judgment was pronounced in the usual form, declaring that the plaintiff and the other debenture-holders had a charge on the undertaking and property of the company, including uncalled capital, and directing inquiries as to what mortgage debentures were outstanding, who were the holders, and of what the property comprised in them consisted.

On July 21, 1895, a receiver was appointed in the action.

By his certificate dated July 29, 1895, the district registrar found that the whole of the series of first mortgage debentures were held by the plaintiff as her husband's executrix and were unpaid, and that the property comprised in them consisted of (amongst other things) amounts of uncalled capital due from eight shareholders, including 2690*l.* due from the plaintiff as her husband's executrix on the 269 shares. The finding as to uncalled capital was based on the ground that, as the agreement of May, 1892, was not registered until December, 1892, the shareholders were liable to pay for their shares in cash, pursuant to s. 25 of the Companies Act, 1867. Being a party to the action, Mrs. Madeley would be bound by the certificate unless varied, and therefore she took out this summons to vary the certificate by omitting her name as the holder of 2680*l.* uncalled capital of the company. The summons now came on for hearing.

P. O. Lawrence, Q.C., and *C. Macnaghten*, for the plaintiff. If the certificate stands as it is, the plaintiff must be held bound by it. This, however, would have the effect of placing her in a worse position than the other shareholders, for she would be the only one prevented from disputing liability as a shareholder. The objection we raise at the outset to this finding is that it is not in accordance with the practice or procedure of the Court. The liability (if any) of the plaintiff on her shares must be decided in other proceedings, for the Court cannot, in an action of this kind, follow up the finding by making a call. If the Court were to decide now in favour of the liability, the decision might be useless or hypothetical, for it is impossible to ascertain in this action whether the company is in such a position as to render it necessary to enforce the liability by a call. A call may turn out to be unnecessary, and the Court will then have made a useless order. This summons ought to stand over to abide the result of proceedings in which the liability (if any) of the contributories can properly be ascertained.

Renshaw, Q.C., and *E. S. Ford*, for the defendants. The finding of the district registrar is perfectly regular, for he was

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bound to certify as directed by the Court under the judgment. As to the argument that a decision confirming the plaintiff's liability might be useless or hypothetical, the answer is that, if we once have a finding of liability, there is a ground or substratum for a winding-up petition, and eventually for making a call against all the contributories.

P. O. Lawrence, Q.C., in reply.

KEKEWICH J. This is a question of procedure, and one of some little importance by reason of the large number of debenture-holders' actions that are brought at the present day. I am told by my senior chief clerk, whom I have questioned on the subject and who has had great experience in such matters, that this certificate of the district registrar is in the common form, and that under such an inquiry as has been here directed it would be the ordinary practice in chambers to find the amount of uncalled capital in the form in which it has been found in this certificate. Of course, if any particular claim were disputed in chambers, it would be competent for the chief clerk or the district registrar to state that it is disputed, and that is sometimes done, so that the claim is reserved for the Court on further consideration. But judges having set their faces against that form of finding, it will not be resorted to except in special cases.

Therefore, I start with this finding being right in point of form according to the practice of the Court. But then I can bind no one by this finding but for this accident, that this plaintiff, who holds the whole of the first series of debentures, has been found liable for uncalled capital to the extent of 2690*l*. Therefore she is bound by that finding. The question is whether I ought to bind her by refusing to vary the certificate, or to leave the question of her liability to be decided by further proceedings.

Cases constantly occur in chambers in which the Court finds it inconvenient to decide questions which may not improperly be decided on certificate, and finds it desirable to direct the institution of separate proceedings: as, for instance, where two persons are joint debtors, and one is party to the proceedings

and the other not. But that is an exceptional case, and I must deal with the question on general lines. Ought I or ought I not to decide the plaintiff's liability on her shares in this action, though I cannot decide whether seven other persons are liable on the shares vested in them? My chief clerk, when I asked him the question, was unable to tell me of any case in which a debenture-holder plaintiff had also been a shareholder; and I assume from the silence of counsel that there is no such case to be found in the books. But a debenture-holder's action is analogous to an action for the execution of the trusts of deeds, and more particularly to an administration action: I cannot say it is analogous to cases of partition or partnership, though they are both samples of administration actions. In an administration action the Court is ex necessitate rei bound to try every question that arises, in order to administer the estate. Take the ordinary case of a creditor's administration action, where one creditor sues on behalf of himself and all other creditors and not on his own behalf alone. In that action the ordinary administration judgment is pronounced directing the usual inquiries which are to be worked out in chambers. It is the duty of the chief clerk under those inquiries to certify what the outstanding personal estate of the deceased consists of. The executor brings in a statement on affidavit, from which it appears that the plaintiff is alleged to be a debtor to the estate. Of course, if that allegation is proved, it will affect the whole distribution of the estate and the rights of all other parties, and also the position of the plaintiff, who cannot claim anything until he brings in what he owes to the estate. The practice in chambers is invariably, so far as my experience goes, to try that question against the plaintiff, though it could not be tried against other debtors who are strangers to the action. That, in my opinion, works no hardship to the plaintiff creditor, because, having brought his action, he is bound to face the question when it is raised, and he cannot complain that, when he has resorted to the Court for the purpose of raising the debt he claims to be due to him, he is called upon to justify his claim upon his being found to be indebted to the estate. Other creditors who may be in the same position of being also debtors

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to the estate may not be before the Court, and therefore may not have submitted to the jurisdiction; but it appears to me that the plaintiff has in such a case submitted to the jurisdiction, and I see no advantage that would be gained by postponing the decision of the question. Now all this is, in my opinion, directly applicable to a debenture-holder's action.

But then there is this difficulty. It is said that all the chief clerk has found is that these sums are due from Mrs. Madeley and other shareholders as uncalled capital. The chief clerk finds that Mrs. Madeley as executrix holds shares on which 2690*l.* remains unpaid, which shares she is liable to pay for to the extent of her testator's assets if and when the capital is called up. The capital cannot be called up in this action, and therefore it is said that, in deciding the question of the plaintiff's liability now, I should be deciding uselessly and hypothetically. But Mr. Renshaw gets rid of that in this way: he says that when you know that Mrs. Madeley owes the money you have the substratum or foundation for a winding-up petition; that you have a decision that something is due from Mrs. Madeley, and you have advanced possibly to this extent, that you can make a call against the contributories. That appears to me to get rid of the difficulty inherent in the want of jurisdiction of this Court to make a call in this action and enforce it. There is no possible advantage—on the contrary, there is some disadvantage—in allowing this case to stand over to await the result of other proceedings for ascertaining Mrs. Madeley's liability. Therefore, Mr. Lawrence, I must ask you to open your summons to vary.

[The summons was then argued on the merits, when his Lordship held, upon the facts, that the other shareholders included in the certificate as liable for uncalled capital were in substantially the same position as the plaintiff, and that a decision against her would necessarily hamper them greatly in any litigation raising the question of their liability, and would prevent their having fair play; also that the evidence as to the circumstances under which the shares were held was insufficient and unsatisfactory. He accordingly directed the district

registrar's certificate to be varied by omitting the whole of the finding as to the amount of uncalled capital said to be due from the shareholders.]

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Solicitors: *Pritchard, Englefield & Co., for J. Leigh, Manchester; Phelps, Sidgwick & Biddle.*

G. I. F. C.

In re CONTINENTAL OXYGEN COMPANY. ELIAS *v.* CONTINENTAL OXYGEN COMPANY.

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1897
Feb. 4, 18.

[1896 C. 1045.]

Company—Debenture — Floating Security — Foreclosure — Absent Debenture-holder.

In a debenture-holders' action, where the debentures constitute a charge on the property of a company by way of floating security, foreclosure cannot be ordered in the absence of any one debenture-holder.

Sadler v. *Worley*, [1894] 2 Ch. 170, and *Welch* v. *National Cycle Co.*, W. N. (1886) 97, Palmer's Company Precedents, 6th ed. Part I. p. 909, considered.

FURTHER consideration of a debenture-holders' action.

The defendant company, which was incorporated in 1886 for the purposes of manufacturing and supplying oxygen in different countries in Europe, in May, 1891, borrowed a sum of 15,000*l.* by the issue of 150 mortgage debentures of 100*l.* each, by each of which the company charged by way of floating security the patents and all other real and personal property then or at any time thereafter belonging to the company.

The plaintiff was the holder of 125 of the debentures for securing 12,500*l.* in the aggregate.

Default having been made in payment of both principal and interest due under the debentures, this action was brought against the company in March, 1896, by the plaintiff, on behalf of himself and all other holders of debentures issued by the company, claiming that the debentures might be enforced by foreclosure or sale.

In May, 1896, judgment in default of defence by the defendant company was pronounced, directing the usual inquiries,

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including inquiries as to the number and the holders of the debentures, and as to what property was included in the debentures.

On November 30, 1896, the chief clerk made his certificate, finding that all the debentures were held by six persons, of whom the plaintiff was one, and that debentures to the amount of 200*l.* were held by Madame la Baronne Jorant, another of such persons, a French subject residing in Paris. The chief clerk also found that the property comprised in the debentures consisted of various oxygen patents, and of shares in other oxygen companies.

Notice of the judgment was sent to Madame Jorant at her registered address, together with a letter by the plaintiff's solicitor offering to act for her without charge; but no reply had been received, and she had not attended the proceedings.

On February 4, 1897, the action came on to be heard on further consideration, all the debenture-holders except Madame Jorant being represented by the plaintiff's solicitors. There was evidence that the patents belonging to the company were valueless, and that there was no market for any of the shares held by them.

P. F. Wheeler, for the plaintiff and the other debenture-holders except Madame Jorant. The property comprised in the debentures being worthless, and a sale being therefore futile, the Court is now asked to make an order for foreclosure as in *Sadler* v. *Worley*. (1)

[KEKEWICH J. In that case I was careful to point out that my decision did not apply to such a case as the present one. What form of order do you ask for?]

I ask for an order such as was made in *Welch* v. *National Cycle Co.* (2), and set out in Palmer's Company Precedents, 6th ed. Part. I. pp. 908, 909. In *Oldrey* v. *Union Works Co.* (3) a foreclosure was ordered in a debenture-holders' action where the security comprised patents and choses in action.

[KEKEWICH J. I do not see how I can make a foreclosure

(1) [1894] 2 Ch. 170. (2) W. N. (1886) 97.
(3) W. N. (1895) 77; 72 L. T. (N.S.) 627.

order in favour of the absent debenture-holder. She may not care to become the owner of an undivided share in this property which is said to be worthless.]

She is only entitled to 200*l.* out of 15,000*l.*, that is to say, one seventy-fifth of the whole. In *Luke* v. *South Kensington Hotel Co.* (1) it was decided that one of several mortgagees can maintain an action for foreclosure, making the other mortgagees defendants if they are unwilling to be joined as plaintiffs.

KEKEWICH J. said that he would take time to consider the case, and intimated that he should be glad to be referred to any other authorities dealing with the question.

[A note referring to authorities on the subject was subsequently submitted to his Lordship, and the following cases (in addition to those mentioned in the judgment) were cited: *Montgomerie* v. *Marquis of Bath* (2); *Cockburn* v. *Thompson* (3); *Fairfield Shipbuilding and Engineering Co.* v. *London and East Coast Express Steamship Co.* (4)]

Feb. 18. KEKEWICH J. On further consideration of a debenture-holders' action, I am asked to make an order of foreclosure. The property comprised in the debentures, and to which the order of foreclosure would apply, is set out in the 2nd schedule to the chief clerk's certificate, and consists of certain foreign patents and certain shares all stated to be fully paid in joint stock companies. The first question is whether an order of foreclosure can properly be made with reference to such property, bearing in mind that it is only charged by the debentures, and has never been in any way vested in the debenture-holders, or in any persons in trust for them. Although property of this particular kind did not exist, so far as I remember, in *Sadler* v. *Worley* (5), I embraced it in my consideration of that case, and the language of my judgment was intended to extend to it. I have been unable to ascertain how

(1) (1879) 11 Ch. D. 121.
(2) (1797) 3 Ves. 560.
(3) (1809) 16 Ves. 324, note (43).
(4) W. N. (1895) 64.
(5) [1894] 2 Ch. 170.

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far the conclusions at which I arrived on that point in *Sadler* v. *Worley* (1) have been criticised or approved by other judges or by the profession. Under these circumstances I am not disposed to reconsider my conclusions, and if this were the only point for decision I should hold the plaintiff entitled to the relief asked. The foreclosure would in that event have to be worked by proper directions for vesting the charged property in the debenture-holders free from redemption.

But there is a greater difficulty in the plaintiff's way, which also was before me in *Sadler* v. *Worley*. (1) It is noticed in the opening sentence of my judgment, and being then immaterial was dismissed in a few words, but it was nevertheless then much considered. I have considered it again with special reference to the circumstances of this case, and it now calls for further treatment. I shall not endeavour to decide what may hereafter happen in other cases, where the facts are not substantially the same as they are here. It will suffice to deal with the actual case in hand. The plaintiff is not the owner of all the debentures. There are five others whose names with their respective holdings are set out in the 1st schedule to the chief clerk's certificate. Four of them combine with the plaintiff, whose counsel was instructed to appear for them on the hearing on further consideration; but the fifth, Madame la Baronne Jorant, who holds debentures for 200*l*., is not a party to the action. According to the established practice in chambers, notice of the judgment was sent to her in Paris through the post; but this of course did not make her a party, and she has never appeared. This has neatly raised the question whether I can properly make an order of foreclosure in favour of her as well as the other debenture-holders in her absence. When considering whether a particular order can be made or not—in other words, whether there is jurisdiction to hear and grant any particular application—it is useful to reduce the proposed order into form, and to test the question by the language of that form. I therefore inquired of counsel what precise order he asked, and his reply was that he asked such an order as was made by Chitty J. in *Welch* v. *National Cycle Co.* (2), which is

(1) [1894] 2 Ch. 170. (2) W. N. (1886) 97.

set out in the last edition of Mr. Palmer's volume of Company Precedents, page 909. In that case the debenture-holders consisted of the plaintiff and two defendants, and the order provided for redemption on payment to the three, and for conveyance in default to them. I omit all reference to a third class debenture-holder as not touching the present question. On principle it seems right that an order of foreclosure in the primitive sense—that is, an order which merely discharges the equity of redemption remaining in a mortgagor who has conveyed the legal estate to the mortgagee—should be made on the application of one of two mortgagees as against the other, because this release of the equity of redemption really adds nothing to the mortgagee's original estate, and is the inevitable result of the mortgage contract; but it does not follow that an order of foreclosure ought to be made as against one of two mortgagees where it has to provide for the conveyance to him of property which it is possible he has no wish or intention to take as his own, although he accepted a charge on it. This point is not touched by the order to which I have just referred, for though it declares a charge, and directs a conveyance operating as foreclosure, the debenture-holders other than the plaintiff were not only parties as defendants, but consented to the order, so that it was made with the concurrence of all. There still therefore remains open the question whether such an order can be made where the consent of one of the debenture-holders has not been obtained. Mr. Wheeler has been good enough to furnish me with a list of authorities bearing on this point which his industry has discovered, including *Drage* v. *Hartopp* (1), *Davenport* v. *James* (2), *Lowe* v. *Morgan* (3), and *Palmer* v. *Earl of Carlisle.* (4) None of these cases can be cited as an authority for the proposition that foreclosure can be granted in the absence of one of two or more mortgagees. The only suggestion to the contrary is to be found in *Drage* v. *Hartopp* (1); but it illustrates the maxim that the exception proves the rule. There the mortgage was vested in two executors, one of whom had absconded and could not be made

(1) (1885) 28 Ch. D. 414.
(2) (1847) 7 Hare, 249.
(3) (1784) 1 Bro. C. C. 368.
(4) (1823) 1 S. & S. 423.

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a defendant with any prospect of service upon him. Pearson J. held that he was an unnecessary party, but, as appears from the report and especially from the arguments, on the ground that one of two executors sufficiently represented the estate. Much learning on this subject is to be found in the judgment of the Court of Appeal in *Luke* v. *South Kensington Hotel Co.* (1), where the right of one of two or more mortgagees to maintain an action of foreclosure against the others was upheld, provided that the others were unwilling to be joined as co-plaintiffs, or had done some act precluding them from being plaintiffs. In this case I have one debenture-holder who is not a party. I do not see my way to a workable provision for payment to her and the others of the money due on the debentures; and even if that difficulty were got over, I do not see how I can properly direct an assignment to her of a share in the patents, or a proportion of the shares in the joint stock companies. It may be said that it is not right that the plaintiff and those who act with him should be debarred from what otherwise would be just relief by reason of the negligence of one debenture-holder to protect her interests in the ordinary way—negligence which, from what I was told of the character of the property, may possibly arise from knowledge that it is worth little or nothing. On the other hand, it must not be forgotten that the extension of relief by way of foreclosure to such charges and on such property is one by no means naturally following from the early history of this branch of jurisdiction, and that persons advancing money on these peculiar floating charges must be deemed to have done so with knowledge of the risk incurred, including the difficulty of realizing the assets of an insolvent joint stock company. The property being, as I understand, worthless, it is only right that the plaintiff and those acting with him should have every facility for acquiring it if they please, in the hope of turning it to account hereafter, and I will give any assistance which the practice of the Courts allows in that direction, but for the reasons already stated I do not see my way to make a foreclosure order.

(1) 11 Ch. D. 121.

[His Lordship then made an order for sale of the property comprised in the debentures under the direction of the judge in chambers, and intimated that, if the plaintiff brought in a reasonable proposal the result of which would be to vest the property in the plaintiff and those acting with him, his Lordship would entertain such proposal.]

Solicitor: *William Sharp.*

C. C. M. D.

ROMER J.
1897
Feb. 18;
March 6.

In re HUNTER.
HOOD *v.* ATTORNEY-GENERAL.

[1896 H. 3473.]

Charity—Will—Bequest of Trust Funds to be applied "in Grants for or towards the Purchase of Advowsons or Presentations."

A bequest to trustees to expend the income or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations" is not a good charitable bequest.

In re Macduff, [1896] 2 Ch. 451, followed.

SUMMONS for the determination of the question whether the trusts declared by the will of the testator were void or were valid as charitable trusts.

Edward Hunter, by his will, dated May 26, 1877, after appointing his wife and A. G. Langley and the plaintiff executors, and bequeathing divers specific and pecuniary legacies, gave all his estate and effects, real and personal, to his wife if she should survive him, but if she should not survive him, then he gave the same to A. G. Langley and the plaintiff upon trust for conversion as therein mentioned, and to pay the income of one moiety to his sister Rachel Hunter for her life, and the income of the other moiety to his brother-in-law J. S. Williams during his life. And he declared that on the death of such of them his said sister and brother-in-law, the moiety in which she or he should have had a life interest, or so much thereof as should be legally applicable for charitable purposes, should be paid or transferred by his general trustees for the time being to special trustees, to be held and applied by them upon the trusts and in manner following, that is to say: "The special trustees may retain or invest such part of my residuary estate as shall come to or devolve upon them in or upon any stocks, funds, shares or securities which they may think proper, and whether of the class hereinbefore prescribed by me or not; and they may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations, or in creating or contributing to the erection, improvement or

endowment of churches, chapels or schools, or in paying or contributing to the salaries or income of rectors, vicars or incumbents, masters or teachers, but upon the following conditions: (1.) That only such churches or chapels shall be subscribed or contributed to wherein the service shall, in the opinion of the special trustees, be conducted upon pure Protestant and Church of England principles, by which I mean the principles of the Church of England as held and inculcated by those of her divines, clergy, and members who are distinguished as Evangelical and loyal to the work and fruits of the Reformation, and holding doctrines and principles free from all Popish and Roman Catholic tendency and opposed thereto; (2.) That only such schools shall be subscribed or contributed to wherein true Protestant and Church of England principles are distinctly taught and inculcated, with preference to those established for children of the poorer classes; (3.) That only such masters and teachers receive grants who best shew forth by their teaching and example true Protestant and Church of England principles; (4.) That no payment shall be made directly or indirectly to or for the benefit of any rector, vicar or incumbent unless upon condition that he shall, if not prohibited in law, at the principal Sunday morning service in his church, selecting a time and state of weather when the congregation is supposed to be greatest, read the Thirty-nine Articles of the Church of England, and which I recommend he should make the subject of his discourse from time to time, and upon further condition that he shall, on the first Sunday of every month at the chief morning service, preach a sermon on 'Love' from a text taken from the Gospels, Epistles, or Revelations of St. John; and I declare that if the special trustees shall find or consider that any rector, vicar or incumbent, master or teacher shall preach, teach, publish, inculcate, encourage, adopt, or follow any doctrines or practices which shall be contrary to or at variance with true Protestant and Church of England principles, he or she shall be disqualified from receiving any benefit under this my will." And it being the testator's wish that as much as possible of his residuary estate should be applicable and available for administration by special trustees in manner aforesaid, he declared

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that all his debts, funeral and testamentary expenses, and legacy duty, should be paid out of such parts of his residuary estate as were not legally applicable to charitable purposes to the exoneration of the residue thereof, and that no part of his residuary estate which should be so legally applicable should be invested or dealt with as to make the same inapplicable or unavailable for these purposes. And the testator appointed certain persons named in his will, all of whom predeceased him, to be the first special trustees, and that, if they declined to act as such, then special trustees should be nominated by his general trustees for the time being; and he declared that on the death of such of them his said sister and brother-in-law, so much of the moiety in which she or he should have had a life interest as should not be legally applicable to charitable purposes should be held by his general trustees for the time being upon trust for his nieces, Marion Edwards, Eliza Evelyn Edwards, Rachel Edwards, and Mary Ann Cooke, or such of them as should survive him, in equal shares, as therein mentioned.

The testator's wife, his sister Rachel Hunter, his brother-in-law J. S. Williams, his niece Marion Edwards, and A. G. Langley, one of his executors and trustees, all died in his lifetime. The testator died in July, 1896, leaving personal property of the value of 86,000*l.* or thereabouts, and real estate of small value.

W. C. Druce, for the plaintiff, the surviving executor and trustee.

Ingle Joyce, and *Dibdin* (*Sir R. Webster*, *A.-G.*, with them), for the Crown. The trust is a good charitable trust as to the whole of the estate. The argument on the other side will doubtless be that the gift for the purchase of advowsons is not a charitable one, and that, one purpose being bad, the whole gift fails. But we submit that the gift for the purchase of advowsons or presentations is a good charitable bequest, and that the trust is one of a public character, and is in law a charitable trust: *In re St. Stephen, Coleman Street*. (1) But,

(1) (1888) 39 Ch. D. 492.

assuming that the trust for the purchase of advowsons is not a good charitable trust, that will not invalidate the other objects which are clearly charitable: *In re Douglas.* (1) *In re White* (2) was also referred to.

Levett, Q.C., and *George Lawrence*, for the testator's heir-at-law and next of kin. Here the object is indefinite and must fail; and if the first object fails the whole gift fails, and the property goes as undisposed of: *In re Macduff* (3); *Aston* v. *Wood.* (4)

Farwell, Q.C., and *Ashworth James*, for the three surviving nieces of the testator. The whole trust fails; and, if the Court so holds, the nieces are entitled under the gift over to them in the will of so much of the trust property as shall not be legally applicable to charitable purposes.

Dibdin, in reply.

Cur. adv. vult.

March 6. ROMER J. Further consideration of this case has not enabled me to see my way to support the gifts the object of this adjourned summons.

The first object mentioned by the testator upon which his special trustees are to be at liberty to expend the income, or any portion of the capital of the trust fund, is "in grants for or towards the purchase of advowsons or presentations." Now, if this is not a charitable purpose it appears to me the whole gift fails, on this general principle, shewn by a series of authorities amongst the last of which is *In re Macduff* (3), that a gift by a will of the class I am dealing with is not a good charitable gift if the trustees may (speaking of substantial matters) apply the property to some purpose which is not charitable.

Now, in considering in this case whether the above-mentioned object is or is not charitable, I must look to the whole will. But when I do so, I am still unable to hold that the object is charitable. It may be conceded that the testator thought the objects he indicated in his will were all charitable—and some are undoubtedly charitable—but the testator's opinion, of course,

(1) (1887) 35 Ch. D. 472
(2) [1893] 2 Ch. 41.
(3) [1896] 2 Ch. 451.
(4) (1868) L. R. 6 Eq. 419.

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will not make the gift good if the first object specified is really not charitable. And I can find nothing in the will that I can properly lay hold of which enables me to declare the first object to be charitable. None of the conditions mentioned by the testator apply in terms to the first object. At most, all that I can gather from these conditions and from the will as a whole is, that the testator hoped and expected that the person or persons who might purchase the advowsons or presentations by means of grants from the trust fund would, on vacancies occurring, present fit Protestant clergymen of a class which (to use in an abbreviated form the language of the testator) is distinguished as Evangelical. The testator has not limited his special trustees to the purchase of advowsons or presentations in their own names. The words of the gift are, "in grants for or towards the purchase"; and I can see nothing in the will to enable me to hold that if a grant is made to some third person or persons to purchase an advowson or presentation such person or persons is or are to hold it when purchased upon any trust. And even if the special trustees bought in their own names, I cannot see upon what trust (if any) they were to hold. And further, even assuming that they were to hold upon trust to present Evangelical clergymen as vacancies occur, I cannot see that this is a charitable trust. Indeed in one sense, so far as it would tend to narrow down the number of fit and proper clergymen of the Church of England from whom to select for the vacancies, and to prevent the parishioners of the parishes in which the livings were from ever having any clergymen in their parish except of the Evangelical type whether they wish it or not, it might be said to be decidedly uncharitable. Whoever holds an advowson or presentation is bound on a vacancy to present a fit and proper clergyman of the Church of England; and I cannot see what charity it can be to try and get advowsons or presentations into the hands of particular persons likely only to select from a special class of the clergymen of the Church of England.

Reference was made to the case of *In re Douglas*. (1) But that case in no wise conflicts with the cases above referred to,

(1) 35 Ch. D. 472.

of which *In re Macduff* (1) is one, and which in my opinion governs this case. All that *In re Douglas* (2) really decided I will state. In that case you could gather from the will that the testatrix intended to give her property to charitable societies to be selected by S., and that she thought certain societies she named were charitable, and indicated them as being within the power of selection by S.; but S. had not selected them. In that state of things, the Court held that the gift intended for the benefit of charities was not rendered bad merely because the named societies might prove on investigation to be uncharitable. *In re Douglas* (2) clearly does not apply to the case before me. For these reasons I hold the gift bad.

The declaration in favour of the nieces does not amount to a gift over, the residue being in terms limited to property which could not be legally applied to charitable purposes; and as the whole property was legally applicable to charity, but for the above reasons cannot be so applied, there is nothing which can pass to the nieces under the gift to them. There must be a declaration that the testator died intestate as to the whole of the property.

Solicitors: *West, King, Adams & Co.; Solicitor to the Treasury; Hollams, Sons, Coward & Hawksley.*

(1) [1896] 2 Ch. 451. (2) 35 Ch. D. 472.

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March 6.

In re JAMES COLMER, LIMITED.

Company—Reduction of Capital—Different Classes of Shareholders—Alteration of Voting Rights.

The Court has power in a proper case to confirm a resolution for reduction of capital notwithstanding that the voting powers may be thereby affected.

Hutton v. *Scarborough Cliff Hotel Co.*, (1865) 2 Dr. & Sm. 521, and *In re Continental Union Gas Co.*, (1891) 7 Times L. R. 476, observed upon.

PETITION to sanction resolutions for reduction of capital.

The company was incorporated in 1889 under the Companies Acts, and the object for which it was established was for the purchase and taking over the business of silk mercers and drapers at Bath.

By the memorandum of association the capital of the company was declared to be 55,000*l.*, divided into 5500 shares of 10*l.* each, with such preference and priority as might for the time being be provided by the articles of association.

By the articles of association the original capital was divided into 2500 preference shares, entitling the holders thereof to a cumulative preferential dividend at the rate of 6*l.* per cent. per annum and to priority in repayment of capital, and 3000 ordinary shares. The whole of such original capital was issued.

Pursuant to powers in the articles of association, the capital was subsequently increased to 100,000*l.* by the creation of 2500 new preference shares of 10*l.* each, ranking pari passu with the original preference shares, and 2000 new ordinary shares of 10*l.* each. Of such new preference shares 1100 were issued, making in the whole 3600 preference shares issued, and 1100 new ordinary shares were issued, making in the whole 4100 ordinary shares issued. All the issued preference shares original and new were fully paid up, and all the issued ordinary shares original and new were paid up to the extent of 8*l.* per share.

By clause 33 of the articles it was provided that "the company shall have power to reduce its capital, whether paid up or

uncalled, and whether by cancelling unallotted shares or otherwise, and to consolidate and also subdivide its shares, or any of them, into shares of a larger or smaller denomination. Upon a reduction of capital, capital shall be written off in inverse order to that of its priority in repayment of capital."

Art. 51 empowered the holders of any class of shares by a resolution passed by such majority as therein mentioned, at a meeting of such holders convened as therein mentioned, to consent on behalf of all the holders of shares of the class to (among other things) any scheme for the reduction of capital affecting prejudicially the class of shares, and provided that a resolution so passed should be binding upon all the holders of shares of the class.

Art. 53 (so far as is material) was as follows: "Every member shall have one vote for every share held by him."

By special resolutions of the company duly passed and confirmed on April 10 and May 1, 1896, it was resolved—(1.) That the capital of the company be reduced from 100,000*l.* (divided into 5000 preference shares of 10*l.* each and 5000 ordinary shares of 10*l.* each) to 90,000*l.*, divided into 5000 preference shares of 10*l.* each, and 5000 ordinary shares of 8*l.* each; and that such reduction be effected by reducing the nominal amount of the ordinary shares from 10*l.* to 8*l.* each, and extinguishing the liability in respect of uncalled capital on the ordinary shares to the extent of 2*l.* per share. (2.) That the articles of association of the company be altered by substituting for the word "share" in art. 53 the words "one pound of the issued capital of the company for the time being."

By a resolution of the holders of preference shares, duly passed by the majority required by art. 51 at a separate meeting of such holders held on April 10, 1896, it was resolved: "That this separate meeting of the holders of preference shares of the company hereby consents on behalf of all the holders of shares of such class to the scheme for the reduction of capital (including as part thereof the alteration of the company's articles of association), resolutions for which have this day been passed at the extraordinary general meeting of the company"; and on the same day a resolution in the same terms substituting the

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word "ordinary" for the word "preference" was passed by the majority at a separate meeting of the ordinary shareholders.

The form of minute proposed to be registered was as follows: "The capital of James Colmer, Limited (and reduced), is 90,000*l.* divided into 5000 preference shares of 10*l.* each and 5000 ordinary shares of 8*l.* each, instead of 100,000*l.* divided into 5000 preference shares of 10*l.* each and 5000 ordinary shares of 10*l.* each. At the time of the registration of this minute, 3600 of the said preference shares numbered, &c., are issued and are fully paid up, and 4100 of the said ordinary shares numbered, &c., are issued and are fully paid up. The remainder of the said preference shares, namely, 1400 shares numbered, &c., and the remainder of the said ordinary shares, namely, 900 shares numbered, &c., are unissued."

The proposed reduction of capital was resolved upon with a view to the division of the company's capital into shares of a smaller amount by subdividing the preference shares of 10*l.* each into 10 preference shares of 1*l.* each, and the reduced ordinary shares of 8*l.* each into 8 ordinary shares of 1*l.* each, with in each case the sum of 1*l.* credited as fully paid up on each share resulting from the subdivision of a fully paid-up share.

Levett, Q.C., and *Wace*, in support of the petition. By the proposed reduction the voting power of the ordinary shareholders is diminished, and that, according to the decision of Chitty J. in *In re Continental Union Gas Co.* (1), is a fatal blot; but we submit that that decision was founded on *Hutton* v. *Scarborough Cliff Hotel Co.* (2), in which case, a general meeting having altered the articles of association by inserting power to issue new shares with preferential dividend (no such power existing before), it was held that such alteration was an alteration of the constitution of the company, and could not be sanctioned. That case has, however, now been overruled by the Court of Appeal in *Andrews* v. *Gas Meter Co.* (3), and it is no longer law; and it was also dissented from by Lord Macnaghten in *British*

(1) 7 Times L. R. 476. (2) 2 Dr. & Sm. 521.
(3) Ante, p. 361.

and American Trustee and Finance Corporation v. *Couper*. (1) But, assuming that the case of *In re Continental Union Gas Co.* (2) still governs the circumstances of this case, then we submit that the resolutions passed in pursuance of the power contained in art. 51 remove any objection there may be to the reduction on the ground of the ordinary shareholders being prejudicially affected, and that the Court will sanction the resolutions for reduction: *In re Pinkney & Sons Steamship Co.* (3)

ROMER J. In my opinion the fact that by the resolutions the voting powers of the two classes of shareholders are somewhat altered is not of necessity fatal to those resolutions.

In the case before me there are special provisions in the articles enabling a majority of each class to bind the class in certain matters, which would, I think, cover an alteration in voting power consequent on a reduction of capital; and meetings of each class of shareholders have been duly held, and resolutions passed so as to bind the class.

I cannot help thinking that the decision of Chitty J. in the case of *In re Continental Union Gas Co.* (2) was based on the principle supposed to be established by *Hutton* v. *Scarborough Cliff Hotel Co.* (4), and would not have been given if at the time the last-mentioned case had been overruled (as it has since been) by *Andrews* v. *Gas Meter Co.* (5)

I think that in a proper case the Court has power to confirm a resolution for reduction of capital, notwithstanding the voting powers may thereby be affected. I therefore sanction the resolutions.

Solicitors: *Routh, Stacey & Castle, for Adam & Thring, Bath.*

(1) [1894] A. C. 399, 417.
(2) 7 Times L. R. 476.
(3) [1892] 3 Ch. 125.
(4) 2 Dr. & Sm. 521.
(5) Ante, p. 361.

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Feb. 24, 25.

RYMER *v.* McILROY.

[1895 R. 2019.]

Easement—Right of Way—Grant in Gross—Covenant with Yearly Tenant and his "Heirs and Assigns"—Effect of acquiring Fee Simple.

A., the owner in fee of Three-acre, conveyed it to B. by a deed dated March 12, 1869, which recited that it had been agreed that on completion of the purchase B. should grant to A., his "heirs and assigns," a right of way over a defined footway leading from a public road across Three-acre to Blackacre. The deed also referred to another deed as then prepared, which when executed was dated March 13, 1869, whereby B., in pursuance of this agreement and in consideration of the conveyance of Three-acre, covenanted and granted with and to A., his "heirs and assigns," that it should be lawful for them and the tenants and occupiers for the time being of Blackacre to use the footway. A. was then and until 1870, when he purchased the fee simple, only tenant from year to year of Blackacre:—

Held, that, notwithstanding the limited interest of A. when the easement was granted, and the cesser of that interest by merger in 1870, a lessee of Blackacre claiming under the freehold title of A. was entitled to use the footway.

At the date of the conveyance the effect of which is stated below John Drummond and William Drummond were seised in fee of a square piece of land, containing about three acres, in the parish of Croydon, which was bounded on the east by Wellesley Road, and on the northerly half of its west side by two pieces of land, one of which was held by John Drummond and William Drummond, as lessees for a term which expired in 1878, the other being held by John Drummond on a parol tenancy from year to year.

There was a footpath within the three-acre field which ran along its four sides, and had a communication with Wellesley Road at the north-east corner of the field, and communications with the two pieces of land held by the Drummonds on the westerly side.

By an indenture dated March 12, 1869, and made between John Drummond and William Drummond of the one part, and the Warden and Poor of the Hospital of the Holy Trinity in Croydon of the Foundation of John Whitgift, Archbishop of

Canterbury (thereinafter called "the said hospital") of the other part, after reciting that John Drummond and William Drummond were seised in fee simple as tenants in common of the piece of land thereinafter described and intended to be thereby conveyed, and that the hospital had agreed to purchase the said land for 6500*l.*, the following recitals occurred: "And whereas it was agreed upon the treaty for the said purchase that the said hospital should immediately after the completion thereof grant unto the said John Drummond and William Drummond, their heirs and assigns, a right of footway at all times of the width of six feet for them and each of them, and their and each of their heirs and assigns, and their and any of their agents and servants, and the tenants and occupiers for the time being, of the messuages, gardens, and premises coloured pink" in the plan annexed—being the two pieces of land on the west side, above mentioned—"or any part thereof, and all persons going to or from the said messuages, gardens and premises, with the permission of them or any of them over and along a footpath on the north side, and part of the west side of the piece of land intended to be hereby conveyed, and which said footpath is distinguished by a yellow colour on the said plan, and which said right of footway is to extend to and into and from any part of the boundary line of the said premises coloured pink, from and to and into the road called Wellesley Road on the east side of the said piece of land intended to be hereby conveyed. And whereas, in pursuance and part performance of the said agreement, a deed hath been prepared and is already engrossed, and is intended to be executed immediately after the execution of these presents for the purpose of granting such right of way as aforesaid." The deed then witnessed that in further pursuance of the said agreement, and in consideration of the 6500*l.*, John Drummond and William Drummond granted and conveyed the three-acre field unto and to the use of the hospital, its successors and assigns.

The engrossed deed referred to in the above-mentioned indenture was dated March 13, 1869, and was made between the hospital of the one part, and John Drummond and William

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Drummond of the other part. It had a plan on it similar to that annexed to the conveyance, and commenced with a recital of that conveyance, describing the three-acre field as being "bounded on the south by land belonging to" one Robinson, "on the east by Wellesley Road, on the north by lands belonging to" one Eastty, "and on the west partly by land in the occupation of the said John Drummond and William Drummond coloured pink in the plan" on the conveyance. The deed then proceeded as follows: "And whereas it is recited in the said recited indenture that it had been agreed," &c.—stating fully the recital in the conveyance as to the right of way—"and it was further recited in the said indenture that in pursuance and part performance of the said agreement a deed meaning these presents had been prepared and was intended to be executed immediately after the execution of the indenture now in recital for the purpose of granting such right of way as aforesaid Now this indenture witnesseth that in pursuance of the said stipulation and agreement and in consideration of the conveyance of the said land by the said recited indenture, the said hospital doth hereby for themselves, their successors and assigns, covenant and grant with and to the said John Drummond and William Drummond, their heirs and assigns, that it shall be lawful for the said John Drummond and William Drummond, their and his heirs and assigns, and their and each of their agents and servants and the tenants and occupiers for the time being of the messuages, gardens, and premises coloured pink on the plan in the margin of these presents, and of every part of such messuages, gardens, and premises, and all persons going to and from the said messuages, gardens, and premises with express or implied permission by them or any of them to enjoy and use a right of footway at all times hereafter of the width of six feet over and along a footpath on the north side and part of the west side of the piece of land conveyed by the said recited indenture, and which said footpath is distinguished by a yellow colour on the said plan drawn in the margin of these presents, and which said right of footway shall extend to and into and from any part of the boundary line of the said premises coloured pink from and

to and into the said road called Wellesley Road." The deed then concluded with covenants for title in respect of the grant of footway.

In 1870 John Drummond purchased the fee simple in the plot of land of which he was a yearly tenant, such tenancy having continued up to that time. John Drummond died in 1880, having devised his residuary estate (which included the fee simple in this plot) to William Drummond, who died in 1884, leaving all his estate to Elizabeth Drummond.

By a deed dated November 14, 1894, her devisees conveyed to E. B. Staples in fee this land, "together with such right of footway now belonging to the vendors as tenants or occupiers of the premises hereby conveyed or otherwise at all times over and along the footpath of the width of six feet . . . . as was granted by" the indenture of March 13, 1869.

By a lease dated May 29, 1895, E. B. Staples demised the same land to W. McIlroy, together with the same right of way, for a term of ninety-nine years.

Under a scheme approved by Her Majesty in Council on July 15, 1881, it was provided that the above-named charity should be administered, under the name of the Whitgift Foundation in Croydon, by the governing body thereby constituted, who were the plaintiffs in the action mentioned below.

The plaintiffs having commenced to build a wall dividing the three-acre field from the land of McIlroy, the latter promptly knocked it down, claiming a right of access from his land to, and a right of way across, the three-acre field, to Wellesley Road.

The plaintiffs then brought an action against McIlroy, claiming a declaration that he was not entitled to the right of way, and an injunction restraining him from trespassing or entering on their land or destroying or interfering with their walls or fences.

The action was tried before Byrne J.

Eve, Q.C., and *Badcock* (*John Henderson* with them), for the plaintiffs. John Drummond was only tenant from year to year of the land adjoining the plaintiffs' land when the grant of a

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right of way was given to him, and notwithstanding the grant was to him and William Drummond, their "heirs and assigns," the effect of the grant was not to give him an easement in fee. The grant could only give an interest in the easement co-extensive with John Drummond's then existing interest in the dominant tenement, and that interest came to an end by merger in 1870.

An easement as such can only be claimed as accessory to a tenement: Gale on Easements, 6th ed. p. 8. In an early case there cited from the Year Books, 21 Edw. 3, 2, pl. 5, where a right of way over land to a mill was granted, and the grantee was not then seised of the mill, but afterwards purchased it, it was held that the purchase of the mill would not enable the purchaser to maintain an action for disturbing him in the way against the grantor of the way.

No right of way in perpetuity is created by using the words "heirs and assigns": *Lord Dynevor* v. *Tennant*. (1)

So far as the grant was for a period extending beyond the then existing interest of John Drummond in the dominant tenement, it was a grant of an easement in gross and invalid. There is no magic in the use of the words "heirs and assigns," and they do not help the defendant.

The defendant is not the heir or assign of the Drummonds or either of them; he is only a lessee deriving title from the purchase of the freehold which John Drummond acquired in 1870.

[They also referred to *Ackroyd* v. *Smith*. (2)]

Rentoul, Q.C., and *Turrell*, for the defendant. The words of the grant and covenant of the right of way shew an intention to convey a several right of way to each of the Drummonds attaching to their several interests in the tenements. The grant of the land by the Drummonds and their grant of the easement must be taken as one transaction, and the plaintiffs cannot insist on the grant to them and insist that their grant and covenant is bad as a grant of an easement in gross.

There is nothing to prevent a man covenanting that another

(1) (1888) 13 App. Cas. 279. (2) (1850) 10 C. B. 164.

shall have a right of way as long as he is owner of or interested in a tenement.

Lord Dynevor v. *Tennant* (1) has no application; it only points to what the words "heirs and assigns" referred in that case.

Eve, Q.C., in reply.

BYRNE J. This action is brought to determine the question whether the defendant is entitled to a right of way over the land of the plaintiffs, on a footpath thereon, to the land of which he is the lessee. On the statement of claim the plaintiffs' land, which formerly belonged to John and William Drummond, is coloured green, and in 1869 they conveyed it to the hospital. At that time the Drummonds were entitled to certain plots of land abutting on the west side of the green land, and these two plots are coloured pink on the plan. One of these plots was held for a term of years, which expired in 1878. The other was then held by John Drummond as tenant from year to year. This piece is marked C on the plan, and the defendant is now the lessee of this piece.

As part of the same bargain, the hospital granted, and covenanted for, a right of way to the Drummonds across the green land to C and the other plot, and the question is, What is the effect of this grant and covenant?

The conveyance to the hospital was dated March 12, 1869, and it recited the seisin of the Drummonds, the contract for sale of the green land, and that it had been agreed on the treaty for the purchase that the hospital should grant the right of way to the Drummonds, "their heirs and assigns." [His Lordship read the recital, and continued:—]

The recited deed of grant and covenant had already been prepared, and had on it a plan shewing a footpath, coloured yellow, extending from Wellesley Road along the north part of the green land to a point exactly coterminous with the land coloured pink.

The deed of grant and covenant recites the conveyance including the boundaries of the green land; and as to this

(1) 13 App. Cas. 279.

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recital, it may be observed that it describes the land as being bounded on the south and north by lands "belonging to" Robinson and Eastty, whereas it is stated that on the west it is partly bounded by land "in the occupation of" the Drummonds.

The deed then recites the recital in the deed of conveyance with reference to the deed of grant and covenant, and the operative part states that in pursuance of the agreement referred to in the recitals, and in consideration of the previous conveyance, the hospital does "covenant and grant with and to the said John Drummond and William Drummond, their heirs and assigns," in respect of the right of way. [His Lordship read the covenant, and continued:—]

I pause here to observe that the deed clearly was intended to operate as a covenant as well as a grant, and to say that I accept the suggestion of counsel that the "tenants and occupiers" must be tenants and occupiers of John and William Drummond, or of their or one of their heirs or assigns. The covenant clearly refers to the path coloured yellow on the green land, and to that path only. Then follow covenants for title including a covenant for further assurance.

The short point is this. John Drummond was the tenant from year to year of the plot marked C, and in 1870 he acquired the fee simple in the plot. The defendant claims as lessee of that plot from persons who purchased from owners of the fee claiming under John Drummond. The other plot was held under a lease which has expired, and no question arises as to the right of way to that piece. The plaintiffs say that, as John Drummond was only tenant from year to year when the grant and covenant was entered into, the grant was only intended to give him a right of way while that tenancy continued, and not to give him a right in respect of any extended interest which he might acquire. But in my judgment that is not the true construction, having regard to the words "heirs and assigns," and looking at the whole tone and tenour of the deed, and the fact that John Drummond shortly afterwards acquired the fee. The true construction is that, so long as the Drummonds, or either of them, or the heirs or assigns of either of them were interested, this right of way was to subsist. The

probability is, and it is not an unnatural inference to draw, that it was within the contemplation of the parties that the Drummonds might obtain the fee simple in one or more of the plots in which they had then only a limited interest, and that in that case the right of way should continue. I can see nothing illegal in such an agreement, and if that is the contract no such doctrine as that the covenant was with the reversioner, who has destroyed the reversion, arises. The case cited from the Year Books is admittedly no authority in the present case, for there the grantee of the right of way had no interest in the mill at the time when the right of way was granted.

Lord Dynevor v. *Tennant* (1) does not involve the present point, and assuming it decides that you must regard a right of way as having been made with reference to the existing interest in the dominant tenement, that does not preclude the question raised in this case as to the effect of a particular grant or contract where a larger interest in the dominant tenement is subsequently acquired.

The action must be dismissed.

Solicitors for plaintiffs: *Prior, Church & Adams, for Drummonds, Robinson & Till, Croydon.*

Solicitor for defendant: *W. C. Goulding.*

(1) 13 App. Cas. 279.

F. E.

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In re TURNER.
BARKER *v.* IVIMEY.

[1895 T. 1291.]

Trustee—Breach of Trust — Court's Power to Excuse — Solicitor-Trustee — Liability to Indemnify co-Trustee—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The power to relieve a trustee from personal liability for a breach of trust given by s. 3 of the Judicial Trustees Act, 1896, is meant to be acted on freely and fairly in the exercise of judicial discretion, but the Court must, before exercising the power, be satisfied by sufficient evidence that the trustee acted reasonably as well as honestly.

No general rules or principles can be laid down as those to be acted upon in carrying out the section; each case depends on its own circumstances.

Where two trustees appointed by a testatrix, one being a solicitor and the other a linendraper, invested trust money on a mortgage which was an improper investment both as to its nature and as to its value, the Court refused to excuse the linendraper when it was not satisfied that he had acted with the care which he would probably have taken if the money had been his own, but found that he had relied on the solicitor. The Court however, following *Lockhart* v. *Reilly*, (1856) 25 L. J. (Ch.) 697, ordered the solicitor to indemnify his co-trustee from the loss resulting from his negligence.

THE action was brought by Jane Maxwell Barker and Eliza Jane Barker, who were respectively the tenant for life and the person absolutely entitled in remainder to a sum of 900*l.*, being a legacy given by the will of Jane Maxwell Strong; and the plaintiffs sought to have it declared that the first defendant, Henry Ivimey, who was the surviving trustee of the will, and the remaining defendants, F. Jewers, J. H. Nice, and R. T. Burr, who were the legal personal representatives of James Turner, deceased, the other trustee of the will, were liable to make good a sum of 900*l.*, on the ground of breach of trust.

By her will the testatrix appointed Ivimey and Turner executors and trustees, and, after directing payment of all her just debts and funeral and testamentary expenses (long since paid), she directed her trustees to stand possessed of the sum of 450*l.*, then invested upon mortgage of certain leasehold premises at Hampstead, and the sum of 450*l.*, then invested upon mortgage

of certain leasehold and other premises at Acton Green, upon trust to pay the annual income thereof to Jane Maxwell Barker for her separate use without power of anticipation, and after her death to pay the sum of 900*l.*, and transfer any securities in which the same might be invested, to Eliza Jane Barker; and the testatrix directed that, in the event of the said sums of 450*l.* and 450*l.* not being paid off at the time of her decease, it should be lawful for her trustees to continue the said investments, and, in the event of their being paid off, to reinvest the said sums in Government, freehold, or leasehold securities, or securities guaranteed by Government, upon the same trusts as were thereinbefore declared in favour of the plaintiffs. The will also contained a clause directing that, as executor, the defendant Ivimey should be entitled to charge professionally for any work done by him as solicitor under the will or in relation to the estate of the testatrix.

The testatrix died on August 13, 1876, and her will was duly proved by Ivimey and Turner. The two sums of 450*l.* and 450*l.* were paid off by the mortgagor in January, 1879, and May, 1880, respectively. The first-named sum of 450*l.* was then invested upon an equitable mortgage, dated January 24, 1879, upon an undivided moiety of and in Dowgas tenement and common, in the parish of St. Stephen's, in the county of Cornwall, and an undivided fourth share of and in Rock Hill tenement, and certain china-clay works and two tenements in Mollinnis, all in the parish of St. Austell, in the same county, the property of Thomas Gill. On May 12, 1880, the remaining sum of 450*l.* was advanced to Thomas Gill, and a legal mortgage was given to secure the whole of the sum of 900*l.* upon the premises which had been included in the equitable mortgage. Ivimey, who was a solicitor, was himself interested in certain other undivided shares of the property. A portion of the mortgaged property was at the date of the mortgage, with the other undivided shares, let upon a lease for lives, the last of which was still subsisting at the date of the trial.

No report of the value of the property was made by any surveyor, valuer, or other person prior to the mortgage.

Certain letters with reference to the mortgage were written

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by Ivimey to Turner in 1879 and 1880. The first of these letters was dated January 15, 1879, and runs as follows: "Dear Sir,—Mrs. J. M. Strong, deceased.—A mortgage of 450*l.* will be paid off in a few days. I have found another security for the amount at 5*l.* per cent. for a year, and as the mortgagor is a personal friend of mine I can safely recommend the security . . . . When would it be convenient for you to call and execute the reconveyance?" And in a letter of January 20, 1879, Ivimey said: "Thursday next at 2 o'clock has been appointed to pay off this mortgage. Please therefore attend here at that hour." On May 6, 1880, he wrote: "Mr. Williams has paid off the 450*l.* mortgage, and I have agreed to lend that sum to Mr. Gill, who borrowed the other 450*l.* on an equitable mortgage. I have arranged that he shall now execute a legal mortgage for the whole 900*l.* at 5*l.* per cent. interest. The security is on freehold property. Please call at your convenience to execute the release to Mr. Williams." Another letter was written on May 8, in which Ivimey said: "Please make any appointment you like." And on May 10, 1880, Ivimey wrote: "I should be obliged by your signing the enclosed receipt on the back of the mortgage deed and the discharge to be entered on the copyhold rolls. Four o'clock on Wednesday I will fix for completing the mortgage. . . . Please return me the documents at once by registered post."

The husband of the tenant for life died on April 11, 1881. Turner, one of the trustees, died on September 10, 1892. The value of the property mortgaged was 620*l.* or thereabouts, and if saleable was still worth about the same amount. The mortgage, in his Lordship's judgment, was obviously improper, not only in respect of value, but from its nature, inasmuch as it consisted of undivided shares in property, part of which was china-clay works; it was property in which Ivimey was interested, in the sense that he was the owner of other undivided shares in the entirety of the property; and as to part it was reversionary, being let on lives at a rent of 3*l.* 10*s.* per annum, the last of such lives being still subsisting as above stated. The interest on the mortgage was paid for some time regularly, afterwards irregularly; and in the year 1895 these proceedings

were commenced. No oral evidence was given on behalf of the defendants.

Turner's executors delivered a third-party notice to Ivimey claiming indemnity in respect of the consequences of the breach of trust, and also the costs of the action.

Eve, Q.C., and *Solomon*, for the plaintiffs. The surviving trustee is clearly liable for the breach of trust in making an improper investment, and the executors of the deceased trustee cannot contend that their testator's estate is not liable, as between them and the cestuis que trust, because he relied on his co-trustee with reference to the investment: *Thompson* v. *Finch* (1); *Bahin* v. *Hughes*. (2)

The investment was not a breach of trust by reason only of the investment being of insufficient value, and therefore the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 4, sub-s. 1, is no defence: *Blyth* v. *Fladgate*. (3)

It was wrong to invest on property consisting partly of china-clay works: *In re Whiteley* (4) There were, besides, other objections to the investment, for it was on an undivided share; Ivimey held other shares in the same property; and it was of a reversionary nature.

Turner's executors cannot rely on s. 3 of the Judicial Trustees Act, 1896 (5), for Turner did not act reasonably, and his executors cannot say that his breach of trust ought to be excused.

H. Newson, for the defendant Ivimey. Ivimey ought not to be held liable to his co-trustee's executors. The co-trustee

(1) (1856) 22 Beav. 316.
(2) (1886) 31 Ch. D. 390.
(3) [1891] 1 Ch. 337, 353.
(4) (1886) 33 Ch. D. 347; on appeal sub nom. *Learoyd* v. *Whiteley*, (1887) 12 App. Cas. 727.
(5) 59 & 60 Vict. c. 35, s. 3, is as follows: "(1.) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same. (2.) This section shall come into operation at the passing of this Act." (August 14, 1896.)

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was of full age, and competent to look after his interests and those of the trust. The mere fact that part of the property consisted of china-clay works does not make the investment an improper one.

Hopkinson, Q.C., and *Sefton Strickland*, for Turner's executors. It is not a breach of trust to lend on an undivided share or a reversionary interest: Lewin on Trusts, 9th ed. p. 363. We do not say that the security was of sufficient value, but otherwise it was a proper security, although nothing can be added to the value in respect of the business; and therefore the estate of Turner is only liable to make good the sum advanced in excess of what would have been a proper amount to lend on the security: Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 9, sub-s. 1.

The case comes within s. 3 of the Judicial Trustees Act, 1896. It is one which calls for the non-intervention of the law. The section only applies where there has been a breach of trust, and this is the exact case which the new Act was framed to meet.

Turner acted honestly, and honesty is the key-note of the provision. He also acted reasonably, for Ivimey was a solicitor, selected as a trustee by the testatrix herself, and a person therefore on whom Turner was at least as much entitled to rely as a solicitor selected by himself. It is difficult to say when the section does apply if it is inapplicable to this case. We ask the Court to excuse Turner's estate from the consequences of any breach of trust committed by him.

Sect. 8 of the Trustee Act, 1888, is a bar to the claim of the tenant for life.

As regards the third-party notice, Ivimey being a solicitor and intrusted with the management of the estate, is liable to indemnify the estate of Turner against all losses, including costs as between solicitor and client, caused by his negligence: *Lockhart* v. *Reilly*. (1)

Newson (as to the third-party notice) relied on *Bahin* v. *Hughes*. (2)

Eve, Q.C., in his reply, referred to *In re Salmon*. (3)

(1) 25 L. J. (Ch.) 697. (2) 31 Ch. D. 390.
(3) (1889) 42 Ch. D. 351.

Feb. 26. BYRNE J. delivered judgment, in which, after stating the facts substantially as above set out, he proceeded as follows:—Sect. 8 of the Trustee Act, 1888, is relied upon by the defendants as a bar to the claim so far as the plaintiff tenant for life is concerned, and it is admitted that the section applies to bar her claim. The defendant Ivimey is clearly liable to the plaintiff in respect of the breach of trust; but the defendants, the representatives of Turner, claim the benefit—first of s. 9, sub-s. 1, of the Trustee Act, 1893; and, secondly, they say that under s. 3 of the Judicial Trustees Act, 1896, they ought to be relieved from personal liability in respect of the breach of trust alleged, in case the Court should be of opinion that they are personally liable for such breach of trust. I am of opinion that they are not entitled to the benefit of s. 9, sub-s. 1, of the Act of 1893, because I do not consider that the mortgage security in question was a proper investment in all respects for a smaller sum than was actually advanced thereon, and I refer to the observations of Stirling J. in *Blyth* v. *Fladgate*. (1) The defendants, the executors of Turner, say that the Court ought to act on s. 3 of the Act of 1896, having regard to the circumstances of this particular case, and they rely upon certain letters written by the defendant Ivimey to their testator (Turner) in the years 1879 and 1880. [His Lordship read the letters stated above, and continued:—]

Turner was a linendraper carrying on business at Hanwell. Ivimey was a solicitor carrying on business at Staple Inn, Holborn. I have no evidence beyond this to justify me in coming to the conclusion that I ought to relieve Turner's estate under s. 3 of the Act of 1896.

Turner was clearly guilty of a breach of trust, and I have no reason to suppose that he acted otherwise than with perfect honesty in relation to the matter; but I am asked to hold that he not only acted honestly, but also reasonably, and that he ought fairly to be excused for the breach of trust. There is one other fact which appears—namely, that he had been party to a prior breach of trust—the lending of 450*l.* upon equitable mortgage, a fact which is recited in the legal mortgage subsequently

(1) [1891] 1 Ch. 353.

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given. I have literally no further knowledge as to the circumstances of the case or the business capacity of Turner, nor have I any evidence to shew what communications passed between Ivimey and Turner beyond the letters which I have already referred to. I think that the section relied on is meant to be acted upon freely and fairly in the exercise of judicial discretion, but I think that the Court ought to be satisfied, before exercising the very large powers conferred upon it, by sufficient evidence, that the trustee acted reasonably. I do not think that I have sufficient evidence in this case that he so acted; in fact, it does not appear from the letters that Mr. Turner acted in respect of this mortgage as he would probably have acted had it been a transaction of his own. I think that if he was—and he well may have been—a businesslike man, he would not, before lending his money, have been satisfied without some further inquiry as to the means of the mortgagor and as to the nature and value of the property upon which he was about to advance his money. It is consistent with the evidence that he might actually have made further inquiries and have been told the nature of the security. It was argued that Turner was entitled to rely on the statements of his co-trustee as contained in the letters I have referred to, and that I ought to infer that he did so rely without further inquiry. It was pointed out that Ivimey was a solicitor and a trustee appointed by the testatrix, and therefore a person upon whom she relied, and upon whom Turner might consider himself entitled to rely, and that upon these facts alone his estate ought to be exonerated from the consequences of the breach of trust. It would be impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and I think that each case must depend upon its own circumstances. In the present case I do not consider that I have sufficient evidence to entitle me to apply it.

The next question is, What relief are the plaintiffs entitled to? I cannot say that the investment was not within the terms of the trust, although it was a most improvident investment, and under those circumstances I have to consider what is the proper relief to be given. I may remark that the investment

went about as near being outside the terms of the investment clause as it could do without being quite outside. It is perfectly true that there is no absolute rule that you may not invest on an undivided share. It is perfectly true that trustees may invest on reversionary property, and it is true in this case that the solicitor-trustee was not interested in the property mortgaged, although he had an interest in undivided shares of the property, other shares whereof were mortgaged. Under these circumstances, this is what I gather from what was said in *In re Whiteley* (1) by Cotton L.J. After dealing with the particular point he says: "There is one other point which I think Mr. Hemming referred to, namely, he says the judgment was wrong in declaring that the cestuis que trust had a lien on this property till it was sold. Now, in my opinion, in the ordinary course of things it would be right to direct the property to be sold, and to make the trustees answerable for any loss on the sale; but the trustees desiring that that course should not be taken, and that the brickfield should not be put up for sale at present, the sale is postponed at their desire. Till there is a sale, and the property is realized, it is quite right to say that those who are interested in the trust should have a lien on, or claim to be enforced against the property, if the money is not otherwise provided, for that which the trustees, in error and for want of sufficient care, invested on that property." In *In re Whiteley* (1) the property was held to be a property within the terms of the investment clause although a most improvident investment.

In the case of *In re Salmon* (2) Cotton L.J. says: "The case is entirely distinct from that of an investment outside the terms of the trust, which the cestuis que trust must accept or reject. Here the trustee is only liable for the loss, and that liability is to be enforced when the investment is realized." Fry L.J. (3) puts it in this way: "There is no case to shew that where trust money is improvidently invested on an insufficient security of an authorized description, the trustee cannot be made liable unless an option is given him of taking to the security.

(1) 33 Ch. D. 347, 354. (2) 42 Ch. D. 368.
(3) 42 Ch. D. 370.

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I think that the liability of the trustee in such a case is to make good the loss occasioned to the trust estate by the improper investment. The mode of enforcing this liability depends on the circumstances of the particular case. In some cases justice will be best done by realizing the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security."

Having regard to the observations made in those cases, I think that the proper relief to give in this case will be to direct a sale of the property and to declare the trustees liable for the loss.

As to the third-party notice, having regard to the relations between the trustees, I am of opinion that the principles applied in *Lockhart* v. *Reilly* (1) and *Thompson* v. *Finch* (2), and recognised in *Bahin* v. *Hughes* (3), also apply here, and that the defendants, the representatives of Turner, are entitled to indemnity for any loss they may sustain, including their costs of this action as between solicitor and client.

Solicitors for plaintiffs: *Redpath, Holdsworth & Marshall, for William Reed, North Shields.*

Solicitor for defendant Ivimey: *H. Ivimey.*

Solicitor for other defendants: *O. E. Dawson.*

(1) 25 L. J. (Ch.) 697. (2) 22 Beav. 316; (1856) 8 D. M. & G. 560. (3) 31 Ch. D. 395.

F. E.

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[1896 S. 547.]

C. A.
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NORTH J.
Feb. 5, 6, 9.
C. A.
Feb. 15, 16.

Contempt of Court—Breach of Injunction—Person not enjoined or Party to Action—Aiding and Abetting—Committal.

There is a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted a defendant in a breach of an injunction. In the first case the order is made to enable the plaintiff to get his rights; in the second, because it is not for the public benefit that the course of justice should be obstructed.

The Court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it.

Decision of North J. affirmed.

By an indenture of lease dated December 13, 1895, the plaintiff William Seaward demised to the defendant George Paterson the first, second, and third floors of the house No. 53, Fetter Lane, in the City of London, for the term of twenty-one years from December 25, 1895, subject to the payment of the rent thereby reserved, and the covenants and conditions on the part of the lessee to be performed and observed. The lease contained (inter alia) a covenant by the lessee that he would not at any time during the term, without the previous consent in writing of the lessor, do or suffer anything which might be noisy, noisome, offensive or inconvenient to the lessor, or the tenants or occupiers of adjoining or neighbouring premises, or which might interfere with the full and quiet enjoyment by the lessor or his undertenants of such adjoining or neighbouring premises, or which should be, or tend or grow to be, an annoyance, nuisance, damage, inconvenience, disturbance or injury to the lessor, or his superior landlord, or his or their tenants or any of them, and also would not during the term use the premises or suffer the same to be used otherwise than for the purpose of a private club, without the previous written licence of the lessor.

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The ground floor of the house was occupied as a public-house by William Dennington, who was the assignee of a lease thereof, granted on June 11, 1891, to H. R. Armstrong, for a term of sixty years from June 24, 1891.

This action was commenced in February, 1896, by Seaward, Dennington, and W. L. Colyn, a mortgagee of Dennington's interest in the house under the lease of June 11, 1891, against Paterson as sole defendant, claiming an injunction to restrain him from violating the above covenant by him contained in the lease of December 13, 1895.

It was alleged by the plaintiffs that the defendant had used the premises demised for meetings for the purpose of displays in boxing which caused a serious nuisance to the owners and occupiers of the neighbouring and adjoining houses.

At the trial of the action on July 15, 1896, an order was made, "that the defendant, his undertenants, agents and servants, be perpetually restrained from doing or suffering to be done anything which may interfere with the full and quiet enjoyment of the plaintiff William Seaward, or his undertenants, of the premises adjoining or neighbouring to the first second and third floors of the messuage No. 53, Fetter Lane, demised by the plaintiff William Seaward to the defendant by indenture of lease dated the 13th December, 1895 (including as part of the adjoining or neighbouring premises the portion of the same house demised by lease of 11th June, 1891, to Henry Robert Armstrong and now occupied by the plaintiff William Dennington), or which shall be, or grow to be, an annoyance, nuisance, damage, inconvenience, disturbance or injury to the plaintiff William Seaward, or his superior landlord, or his or their tenants or any of them, and from using the said premises so demised to the defendant, or suffering the same to be used, otherwise than for the purpose of a private club, without the written licence of the plaintiff William Seaward."

The plaintiffs alleged that on October 9 and October 21, 1896, George Paterson, the sole defendant, had disobeyed this order, by permitting boxing matches upon the premises: and that George Sheppard and Edwin Murray had assisted the defendant in disobeying it; and they moved that the defendant and

George Sheppard and Edwin Murray, who were described in the notice of motion as the "agents or servants" of the defendant, might be committed to prison, or that the plaintiffs might be at liberty to issue a writ or writs of attachment against the defendant, and against Sheppard and Murray, for their contempt in having disobeyed, and aided and assisted in disobeying, the order of the Court dated July 15, 1896.

There was evidence that a copy of the order of July 15, 1896, was served on Sheppard on October 14, 1896, and that a copy of the order was served on Murray on November 9, 1896. North J. held upon the evidence that Murray was fully acquainted with the terms of the order immediately after it was made, and that Sheppard was fully acquainted with its terms before the days when it was alleged that the injunction had been disobeyed. The learned judge held that Sheppard had taken part in the disobedience as the servant of the defendant or of Murray, and that Murray had knowingly assisted the defendant in disobeying the order.

The motion came on for hearing before North J. on February 5, 1897.

Swinfen Eady, Q.C., and *Method*, for the plaintiffs. The defendant has clearly committed a breach of the injunction, and Sheppard acted as his servant or agent on the occasions in question. He had full knowledge of the injunction. Murray was really the prime mover in the offence. He chose to assist in the doing of that which he well knew was prohibited by the injunction, and, though he is not a party to the action, he is liable to be committed—technically not for a breach of the injunction, because he was not enjoined, but for his contempt of Court in aiding and abetting Paterson in disobeying the order: *Lord Wellesley* v. *Earl of Mornington*. (1)

Seward Brice, Q.C., *Stephen Lynch*, and *R. Ker Kays*, for Murray. There is no jurisdiction to commit for breach of an injunction in such a case as this a person who is not enjoined by it, who is not a party to the action, and who is not even a servant or an agent of the person who is enjoined. There has

(1) (1848) 11 Beav. 180.

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been no contempt by interference with an officer of the Court. No one who is not a party to an injunction and enjoined by it can be committed for a breach of it. The proper remedy is to apply for an injunction against the persons whose acts are complained of: *Barlee* v. *Barlee* (1); *Iveson* v. *Harris* (2); *In re Bahama Islands* (3); *Montague* v. *Hill.* (4) When plaintiffs sue on behalf of themselves and other members of a class, an injunction in the common form protects only the plaintiffs actually named on the record: *Armitstead* v. *Durham* (5); *Lund* v. *Blanshard.* (6) In *Lord Wellesley* v. *Earl of Mornington* (7) the person who was committed was an agent of the defendant, and he was committed because he was an agent. This is the only instance to be found of an agent being committed for disobedience to an order. The words "servants and agents" are usually inserted in orders for an injunction, and they are inserted by way of warning to the person enjoined that he will be liable for the acts of his servants and agents.

Avery v. *Andrews* (8) is distinguishable from the present case. The trustees who were committed there were not mere outsiders, and there had been an attempt to evade the order of the Court. An order for an injunction is not an order in rem; it is binding only upon the parties to it. In *Hodson* v. *Coppard* (9) an injunction was granted to restrain the defendant, his servants and agents, from committing a breach of a restrictive covenant as to the use of a house, but the Court refused to extend the injunction to the defendant's tenants. In *St. John's College Oxford* v. *Carter* (10) the person who was committed for aiding and abetting in the breach of an injunction was himself a defendant to the suit. Murray should have been made a party to the action: *Day* v. *Longhurst.* (11) The extraordinary process of committal for contempt ought not to be invoked when there is any other remedy: *In re Davies.* (12)

(1) (1822) 1 Addams, 301.
(2) (1802) 7 Ves. 251, 256.
(3) [1893] A. C. 138.
(4) (1827) 4 Russ. 128.
(5) (1848) 11 Beav. 556, 561.
(6) (1845) 4 Hare, 290.
(7) 11 Beav. 180.
(8) (1882) 51 L. J. (Ch.) 414; 30 W. R. 564.
(9) (1860) 29 Beav. 4.
(10) (1839) 4 My. & Cr. 497.
(11) (1893) 41 W. R. 283.
(12) (1888) 21 Q. B. D. 236, 239.

The evidence is not sufficient to prove that Murray did anything which would have been a breach of the injunction if he had been bound by it.

George Sheppard, in person.

The defendant Paterson did not appear.

Method, in reply. A mere occupier can be restrained from using a house in a way forbidden by a restrictive covenant of which he has notice: *Mander* v. *Falcke* (1); and so too can an underlessee, even if he had no notice of the covenant when he took his underlease: *Clements* v. *Welles*. (2)

Feb. 9. NORTH J., after stating the facts, continued:—Beyond all question there has been a breach of the injunction by the defendant. It is quite clear that, after the injunction was granted, it was the duty of the defendant Paterson to prevent such proceedings as these from taking place upon the premises of which he is the lessee. Obviously there has been a breach of the injunction by him, and a contempt of Court by reason of that breach.

The next respondent is Sheppard. He is said to have been "master of the ceremonies" when the entertainments in question took place. From his own affidavit it is perfectly clear that he was, on the occasion of the performances on October 9 and 21, employed as a servant in conducting the proceedings by either Paterson or Murray. He was actively assisting in what took place, and on his own shewing he has clearly been guilty of taking part in Paterson's disobedience to the injunction. Whether he was Paterson's servant or agent does not matter. He was served with a copy of the judgment for the injunction on October 14, and, whether he read it or not, he admits he had notice of it. On his own shewing he has been assisting in what he clearly knew to be a breach of the injunction, and aiding in the contempt of Court which resulted from the disobedience to the injunction.

The respondent Edwin Murray stands in a somewhat different position. He was present on both occasions. He says he was there as a mere spectator. The mere fact that he was present

(1) [1891] 2 Ch. 554. (2) (1865) L. R. 1 Eq. 200.

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does not necessarily prove that he was aiding and abetting in that which I have held to be a contempt of Court. I must therefore inquire more closely what his real position was. [His Lordship referred to the evidence on this point, and continued:—]

I have not the least doubt that on the occasions in question he was not present as a mere spectator. He was there as one of the persons interested in the club.

It is said that he had no notice of the injunction. It is true he was not served with the order until November 9; but this is immaterial, because it is clear that he knew all about the injunction from the very first. He was present in court during the trial of the action, though he says he was not there when the judgment was given, and this statement is not disproved. Still he took a deep interest in the case, was present during a great part of the trial, and was informed by the defendant of the result immediately afterwards. That being so, the mere fact that a copy of the judgment was not put into his hands until after the occurrences in question seems to me immaterial. Indeed, if there had been no service of the judgment on him on November 9, my opinion would have been precisely the same. Then it is said that Murray is not a party to the action, that the injunction was granted only against Paterson, his servants and agents, and that Murray was neither a servant nor an agent of Paterson. In my opinion that is not a matter of any importance. The application to commit Murray is made not for breach of the injunction, but for a contempt of Court in aiding and abetting Paterson in the acts which constituted a breach of the injunction, and which were a contempt of Court by him, and by every one who was present and knowingly assisted him in what he did. It is said that as Murray is not a party to the action, no relief can be granted against him. As regards the technical relief for breach of the injunction, that may be quite true. But I accept the ruling of Lord Langdale M.R. in *Lord Wellesley* v. *Earl of Mornington*. (1) In that case the injunction had been granted, not against the defendant, his servants and agents, but against the defendant only; and

(1) 11 Beav. 180.

therefore Batley, who had cut timber the cutting of which was restrained by the injunction, could not be committed for a breach of the injunction to which he was not a party, even as a servant or agent of the defendants. The Master of the Rolls held that Batley could not be committed for breach of the injunction. He said: "I think the objection fatal to this form of notice of motion; but I by no means think, that because Batley is not enjoined in his character of servant and agent, he cannot be punished for knowingly aiding and assisting Lord Mornington in doing that which this Court has expressly prohibited." Therefore that motion was refused. But subsequently a new motion was made against Batley (1) to commit him, not for breach of the injunction, but for contempt of Court in aiding and assisting in the breach by Lord Mornington. It was proved that he had done this, and the Master of the Rolls held that it was quite clear he could under those circumstances be committed for contempt. The plaintiff did not press for a committal, and the Master of the Rolls said (2): "I am glad to be relieved from the necessity of ordering a committal, but Batley must pay the costs of the motion." That is a clear decision that a person who knowingly assists another who is restrained by an injunction in doing acts in breach of the injunction is liable to committal for contempt, although the order for an injunction was made in an action to which he was not a party.

In the present case Murray was not a party to the action, and upon that ground his counsel argued that he could not be committed for contempt. That does not follow. An injunction to restrain a man, his servants and agents, from doing an act, is a common recognised form, and the injunction can be enforced against servants and agents although they are not parties to the action. Murray's counsel failed to explain why servants and agents should be liable to be committed, though they are not parties to the action; while other persons who had done exactly the same things could not be committed because they were not parties to the action. In my opinion that is not the law; any one who deliberately assists another in

(1) 11 Beav. 181. (2) 11 Beav. 183.

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committing a breach of an injunction can be punished for his contempt of Court in so doing equally with a servant or agent of the person enjoined. I think the words "servants and agents" are inserted by way of warning to such persons, not as describing a particular class of persons, but generally as describing assistants of the person who is restrained from committing the particular act. There is no magic in those words. If the act restrained was one which could only be committed through (e.g.) a solicitor, it would be quite right to restrain the man, "his solicitors and agents," from committing it; and the reason why the solicitor assisting in a breach would be open to process for contempt would be, not because he was a solicitor, but because as the solicitor in that particular case he had done an act which must necessarily be done through a solicitor. It seems to me, therefore, clear that Murray, whether he be a servant or an agent or not, stands, because he has assisted the defendant Paterson in committing a breach of the injunction, in the same position as a servant or agent would stand. Under the circumstances I think that all the three respondents have rendered themselves liable to committal. Sheppard is only a servant, and I can deal with him more lightly than with the others. I think it is a case in which I can properly fix the period of imprisonment. All three respondents must be committed, and a direction will be inserted in the order that Sheppard shall be discharged after being in prison for a fortnight, and the other two after being in prison for a month. They are all equally liable for the costs of the motion.

W. L. C.

C. A.

From this decision Edwin Murray appealed. The appeal came on for hearing on February 15, 1897.

Seward Brice, Q.C., Stephen Lynch, and *R. Ker Kays*, for the appellant, made use of substantially the same arguments, and cited the same authorities as in the Court below, and referred to the following additional cases: *Humphreys* v. *Roberts* (1); *Lewes* v. *Morgan* (2); *Roberts* v. *Albert Bridge*

(1) V.C. 1828 A. f. 674, 1 Seton on Decrees (4th ed.) 173; 2 Seton on Decrees (3rd ed.) 869.

(2) (1818) 5 Price, 518, 519.

Co. (1); *Harvey* v. *Hall* (2); *Evans* v. *Bear* (3); *Reg.* v. *Coney* (4); *In re Freston* (5); *Helmore* v. *Smith* (6); *In re Johnson* (7); *Mander* v. *Falcke.* (8)

They also contended that upon the evidence Murray had not aided and abetted in disobeying the order of the Court. He took no active part in the boxing competitions, and was there as a spectator only. Mere voluntary presence at a prize-fight, without assisting either combatant, is not necessarily, as a matter of law, either aiding or abetting: *Reg* v. *Coney* (4); 1 Hale, Pleas of the Crown, 439. The power of committal to prison for contempt is an interference with the liberty of the subject, and in the interest of the public it is of extreme importance that the Court should not have recourse to committal where there is any other remedy, particularly where the contempt is fanciful or not clearly made out. Here Murray had no intention to offend the dignity of the Court, and submits himself to its order.

Swinfen Eady, Q.C., and *Methold*, for the respondents, were not called upon to argue as to the law of the case.

LINDLEY L.J. I agree with the counsel for the appellant that this case is of importance, and that the Court ought to be very chary in committing people for contempt, particularly in cases of fanciful contempt. The Court, unless it is to become useless, must deal with such questions in the interest of the public, bearing in mind that the greater the power it possesses the more caution it is necessary to use in exercising it. However, the case we have now to deal with is not anywhere near the line. It seems to me a plain, straightforward case. [His Lordship then stated the facts of the case down to the granting of the injunction, and continued:—]

The real nuisance complained of was the noise and disturbance created by the boxing performances which were taking place. Now Murray was present in court, and heard a good deal of the proceedings which led to the injunction. He says

(1) (1873) L. R. 8 Ch. 753.
(2) (1873) L. R. 16 Eq. 324.
(3) (1874) L. R. 10 Ch. 76.
(4) (1882) 8 Q. B. D. 534.
(5) (1883) 11 Q. B. D. 545.
(6) (1886) 35 Ch. D. 449, 455.
(7) (1887) 20 Q. B. D. 68.
(8) [1891] 2 Ch. 554.

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that he left the court shortly before the injunction was actually pronounced, or before judgment was given; but he knew the result, and he says so—he knew all about it. Notwithstanding this, arrangements were made for having further boxing performances in September and October; and, on October 9 and 21, more boxing performances took place. Thereupon an application was made to North J. to commit Paterson for infringement of the injunction; but before that application came on Paterson turned round, and said that Murray was the person really responsible for it. Proceedings were then taken to commit Murray, who was not a party to the action either first or last.

Now, let us consider what jurisdiction the Court has to make an order against Murray. There is no injunction against him—he is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning. Mr. Seward Brice has endeavoured to persuade us that there is no such jurisdiction; and that the only course to pursue would be to proceed against him by indictment. I confess that it startled me, as an old equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been familiar doctrine to my brother Rigby and myself that the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the Court, or by assisting those who were bound by its orders. If any authority is required for that proposition, it is to be found in *Lewes* v. *Morgan* (1), in

(1) 5 Price, 518.

Lord Wellesley v. *Earl of Mornington* (1) (which Mr. Seward Brice has so much commented on), in *Avery* v. *Andrews* (2), where the late Kay L.J. upheld that jurisdiction, and also in *Day* v. *Longhurst* (3), where, although there was no committal, the order would have been made if there had been any jurisdiction to make it against the person in question. Mr. Seward Brice has argued very strenuously that there is no jurisdiction to make the order in this case, and has founded his argument mainly on a passage in Lord Eldon's judgment in *Iveson* v. *Harris*. (4) That case was a motion for an attachment against the officers of the Marshalsea Court, arising out of a writ of prohibition against proceeding in an action in that court; and Lord Eldon, differing from a view taken by the Court of Exchequer with respect to certain proceedings on a bail bond, says this (5): "I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into Court, so as according to the ancient laws and usages of the country to be made a subject of the writ." That strikes me as perfectly right. Lord Eldon is addressing himself to the consideration of what persons are bound by the injunction. He is not dealing with the case of persons who go and assist others in setting the Court at defiance; he does not allude to that class of persons at all. The law is defined in a way which is familiar to anybody accustomed to the procedure in Chancery. A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person

(1) 11 Beav. 181.
(2) 30 W. R. 564; 51 L. J. (Ch.) 414.
(3) 41 W. R. 283.
(4) 7 Ves. 251.
(5) Ibid. 256.

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who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls. As to the jurisdiction, if the facts are of the character I have stated, notwithstanding the arguments of Mr. Seward Brice, I cannot bring myself to entertain any difficulty about it.

[His Lordship then stated and commented on the facts, and came to the conclusion that he could not accept Murray's suggestion that he was present at the boxing competitions on the two occasions in question simply as a spectator. If that had been really true in substance, his Lordship would have been unable to regard it as sufficient justification for the order which the Court had made against him. He then continued:—]

But in my opinion the view taken by North J. as to Murray's connection with the club, and as to the character in which he was present on the occasions in question, was the correct one. Murray was not there present as a mere spectator, but as one of the persons interested. There is not the slightest doubt that he was at the bottom of the whole thing. Very likely he may have thought that if these boxing matches were not advertised, and the public were not invited to come, it would be passed over. He knew perfectly well that what was objected to and was restrained was making a disturbance by betting. Very likely he did not intentionally do anything which he thought would get himself sent to gaol. He would not be so foolish. But he knew very well what the objections were, and there is not the slightest doubt that what was done was a gross breach of the injunction; and that the Court would be utterly wrong in listening to this appeal. It must accordingly be dismissed with costs.

A. L. SMITH L.J. I also come to the conclusion that the appeal must be dismissed with costs. The real question to be decided in this case is whether or not Murray, on October 9 and 21, 1896, or either of those dates, was party or privy to, in other words, aided and abetted Paterson in committing a breach of the injunction which North J. had granted on July 15, 1896. As regards the law, I have myself no doubt that if a person who knows that an injunction has been granted aids and abets in committing a breach of it the Court of Chancery has jurisdiction to commit him for contempt, although he is not a defendant in the action, and is not a person against whom the injunction has been granted. That Murray knew of the injunction is clear.

The cases referred to, namely, *Lewes* v. *Morgan* (1), *Lord Wellesley* v. *Earl of Mornington* (2), and *Avery* v. *Andrews* (3), shew clearly that the jurisdiction of the Court can be exercised under the circumstances I have stated.

Now comes the question as to whether or not it is clearly shewn by the evidence here that Murray was guilty of the offence charged against him; because I agree with my brother Lindley that a man is not to be sent to gaol unless the evidence is clear that he is guilty of the offence charged against him; but I have not the slightest doubt that the offence is clearly brought home on substantial evidence. [His Lordship then went minutely through the evidence, and continued :—]

Upon this evidence the Court cannot believe that Murray had nothing whatever to do with either of those meetings except as a spectator, and was therefore not an aider and abettor of the flagrant breach of the injunction which thus took place. I agree with what was laid down in the case of *Reg.* v. *Coney* (4) by the majority of this Court, namely, that the mere fact of a man being present as a spectator at a prize-fight, or a boxing exhibition, or a like thing, does not make him an aider or abettor of what is going on. But in this case there is evidence which clearly proves that Murray was not there as a mere spectator only, but that he was there aiding and abetting

(1) 5 Price, 518.
(2) 11 Beav. 181.
(3) 30 W. R. 564; 51 L. J. (Ch.) 414.
(4) 8 Q. B. D. 534.

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in a breach of the injunction which he knew had been granted, and which he flagrantly disobeyed. For these reasons I think my brother North's judgment in this case must be upheld.

RIGBY L.J. After the close analysis of the evidence that has been given by my brothers, in which I entirely concur, I do not think it is necessary for me to say anything upon that part of the case. I will only say a few words on the argument of Mr. Seward Brice with reference to the jurisdiction of the Court in matters of contempt of Court with relation to injunctions. Unless I entirely misapprehended that argument, it went so far as this, that the Court has no jurisdiction to commit for contempt by way of punishment; but that the jurisdiction is an ancillary or subsidiary jurisdiction in order to secure that the plaintiff in a suit shall have his rights. I do not think that that can be for a moment maintained. I do not remember a case in which it has ever been suggested before in that way, for I am satisfied that the dictum of Lord Eldon in *Iveson* v. *Harris* (1) had absolutely nothing to do with this question. It is quite right, no doubt, that when a prohibition or an injunction is granted the Court should be careful to see how far it extends; and that its meaning with reference to the injunction should not be overstepped, and people be brought in as though they were prohibited or enjoined, when the Court never dreamt of prohibiting or enjoining them. That is true. But it has nothing at all to do with this question, and the passages in the judgment relied upon by Mr. Seward Brice are not in my opinion at all relevant to cases of this kind. That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time—for longer than any of us can remember—and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court. It is astonishing to me to find that jurisdiction questioned at this date. I

(1) 7 Ves. 251.

will not again refer to the cases that have been mentioned by Lindley and A. L. Smith L.JJ., but I will say a few words with reference to *In re Bahama Islands*. (1) The matter was the subject of much consideration in that case, which was before the Privy Council, by judges of very great experience and knowledge; the whole question of contempt was discussed in a more exhaustive manner than in any other case within my experience. There the Privy Council dealt with the punitive jurisdiction, not as new law, but as well settled and incidental to the case before them; and they supported this view of it, for they advised Her Majesty that the prerogative of the Crown in cases of contempt, which they took for granted, extended to the remission of sentences of a punitive character. In that opinion it was not necessary for them to take the other side of the question; but I take it that, irrespective of the decision in the Privy Council, it cannot be doubted that it is the practice of the representative of the Crown, the Secretary of State for the time being, not to interfere in the other branch of cases of committal for contempt when the contempt consists in the refusal to do that which is right to a party litigant. The two cases are broadly distinguished; but it was astonishing to me, as I said before, to have it argued that there are not two branches at all, but that the last branch—that is, the interest of a party litigant—is the only thing that gives jurisdiction to the Court. I entirely deny it, and I do not know that it has ever before been asserted.

Now, with reference to the argument that this jurisdiction is only to be exercised for the benefit of the plaintiff, it is quite true that, in cases of this kind, the Court does not act of itself. It is again quite true that there is no public informer, or public officer, charged with the duty of bringing before the Court cases of contempt, and in the vast majority of cases it is upon the information brought by a party to an action that the Court entertains the question of committing for contempt. But I entirely dissent from the suggestion that when once the Court is seised of the matter any party to the action can exercise any influence whatever. The Court acts upon its own jurisdiction and upon its own authority, though doubtless it would have due

(1) [1893] A. C. 138.

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regard to the wishes and feelings of the person who has brought the matter before it. It is perfectly clear, I think, that the cases in which the plaintiff or a party litigant can waive a right have nothing to do with a case like the present. I have no doubt whatever of the jurisdiction here; and I have no doubt that the facts call for an exercise of that jurisdiction; and although, no doubt, the Court must be very careful how it acts in matters where the discretion is so wide, and the jurisdiction so extensive and important, I do not question for a moment that this is one of those cases in which the jurisdiction ought to be exercised, and the sentence ought to be an exemplary one; for I have no doubt whatever that the aiding and abetting in breach of the injunction here on the part of Murray was both wilful and in a high degree reprehensible. I cannot think that the committal which North J. has pronounced against him was in any way excessive; and I do not think we ought to interfere.

Solicitors: *Norris & Son; Proudfoot & Chaplin.*

W. W. K.

C. A. 1897 *Feb.* 18.

ATTORNEY-GENERAL *v.* TOD HEATLEY.

[1896 A. 2.]

Nuisance—Vacant Land in Metropolis—Deposit of Filth by Third Parties—Continuing Nuisance—Common Law Duty of Landowner—Injunction—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 30, 35, 138, 141.

The defendant was the owner and occupier of a vacant piece of land in the metropolis. He had surrounded it by a hoarding, but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a continuing public nuisance. In an action by the Attorney-General at the relation of the vestry of the parish:—

Held, that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance; and that the Attorney-General was entitled to an injunction to enforce the performance of that duty.

APPEAL from Kekewich J.

This was an action by the Attorney-General at the relation

of the united vestry of the parishes of St. Margaret and St. John the Evangelist, Westminster, and the united vestry, as plaintiffs, for an injunction to restrain the defendants, Mr. Tod Heatley and Sir Henry Moore Brownrigg, from allowing a piece of land at the corner of St. Anne's Lane and Great Peter Street, Westminster, to be and to remain in such a state as to be a nuisance or injurious to health, and also to restrain the said defendants from allowing the said land to be used or let for fairs, shows, or in any other manner which would be likely to be or cause a nuisance, or to be injurious to health.

The action was commenced and a statement of claim was delivered by the plaintiffs under the impression that Mr. Tod Heatley was the owner of the piece of land in question; but Mr. Tod Heatley delivered a defence in which he denied that he was, or ever had been, the owner of it; alleging that since June 10, 1882, it had been, and still was, the property of Sir Henry Moore Brownrigg. The plaintiffs then made Sir H. M. Brownrigg a defendant to the action, without, however, discontinuing the action against Mr. Tod Heatley.

This piece of land was conveyed to Sir H. M. Brownrigg in fee simple by indenture dated June 10, 1882, and shortly afterwards the buildings which formerly existed thereon were pulled down. Up to 1894 the defendant Tod Heatley had an equitable interest in the piece of land; but in that year his interest came to an end, and Sir H. M. Brownrigg became the absolute owner of the property.

After the buildings had been pulled down, the site, which was about a quarter of an acre in extent, was inclosed by a hoarding six feet high. The neighbourhood is a densely populated one, and chiefly inhabited by the poorer classes, amongst whom are many costermongers. No new buildings had ever been erected on the land, and it appeared from the evidence on behalf of the plaintiffs that the hoarding had become dilapidated and had large gaps in it, that dead dogs and cats, vegetable refuse, fish, offal, rubbish, and all kinds of filth had been thrown or deposited upon the vacant ground; also that noisy shows attracting dirty and riotous crowds had been held upon it, and that squatters had used it for their

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caravans. According to the evidence, the condition of the land and the uses to which it was being put constituted a continuing nuisance injurious to the health of the inhabitants of the parish.

The defence of Sir H. M. Brownrigg was that, since the pulling down of the houses, a proper and sufficient hoarding had been provided and maintained round the vacant land, and that he had done all in his power to prevent persons from throwing filth and refuse over, and from breaking the hoarding, and from trespassing on the land; and that it was owing to deficient police protection and sanitary arrangements in the neighbourhood, attributable to a great extent to the neglect of the vestry, that unruly and disorderly persons had been in the habit of doing the acts complained of. And he alleged that on January 10, 1896, before the commencement of the action, his agent had written to the vestry stating that he had given instructions for the repair of the hoarding, and that any future tenant of the land would be prohibited from using it for shows; but that it was impossible for any owner of the land, unless he occupied it himself, to prevent persons from throwing filthy matter over the hoarding, or breaking it up, and for this reason the hoarding was in the first instance let, rent free, to a firm who undertook to keep it in repair and the land clean, but that the hoarding had been rated as an advertising station so excessively that the firm gave up the right to advertise upon it although it was rent free; and he suggested that the dustmen of the vestry should visit the land periodically and keep it clean, and that if the vestry used their influence with the police the damage to the hoarding and the deposit of filth would be prevented.

The action was tried before Kekewich J. on November 24, 1896, when his Lordship, in giving judgment, held that the defendant, Mr. Tod Heatley, was entitled to his costs, he having been made a defendant in the belief that he was owner of the land in question, which he was not. With regard to the defendant, Sir H. M. Brownrigg, his Lordship, after a consideration of the Public Health (London) Act, 1891, ss. 5, 13, 30, 35, 95, and 141, dismissed the action as against him, but without costs, so far as it sought to restrain him from allowing

the land to be and to remain in such a state, or to be used in such a manner, as to be a nuisance or injurious to health.

The plaintiffs appealed against the dismissal of their claim for an injunction against Sir H. M. Brownrigg, and the appeal was heard on February 18, 1897.

Warrington, Q.C., and *Morton Smith*, for the appellants. The evidence in this case shews the existence of a continuing public nuisance injurious to health, and it is the duty of the owner by whose default or sufferance the nuisance has arisen to prevent its continuance, and to cleanse and keep the land in a sanitary condition. In the case of *Proprietors of Margate Pier and Harbour* v. *Town Council of Margate* (1) the nuisance complained of was caused by an accumulation of seaweed, and it was contended that the proprietors, who were the owners of the harbour, were under no obligation to remove the accumulation because it was created by the action of the sea, over which they had no control; but it was held by Lush J., Hayes J. concurring, that there was no doubt whatever that it was the duty of the owners of the harbour to prevent the accumulation of seaweed so that it should not become a nuisance, and that, whether produced by natural or artificial causes, they were bound to remove all matter in the harbour which was a nuisance or injurious to health. This case comes within the principle of that decision.

[A. L. SMITH L.J. Cannot the vestry do what is necessary themselves, and make the respondent pay for it?]

The case does not fall within the 30th section of the Public Health (London) Act, 1891, and the machinery provided by the 35th section is cumbrous and unworkable, for this is a case of constantly recurring deposit of filth, so that the notice would have to be given every day, and the filth would have to be left forty-eight hours after the giving of each notice before the sanitary authority could act. Summary proceedings, therefore, would be an inadequate remedy. This has been found to be the case in practice; and these proceedings are taken by the Attorney-General under s. 13 of the Act, which applies to cases

(1) (1869) 20 L. T. (N.S.) 564.

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where summary proceedings are in the opinion of the sanitary authority inadequate. The learned judge was right in holding that the Attorney-General was entitled to sue, but he refused the injunction upon the ground (1.) that he ought not to impose upon Sir H. M. Brownrigg a serious duty which he could not be reasonably expected to perform; and (2.) that the vestry had, under the Act of 1891, power to cleanse the land themselves. There is, however, no evidence that Sir H. M. Brownrigg cannot perform the duty which the law casts upon him, and the vestry have no adequate statutory powers. Moreover, by s. 138 of the Act of 1891, all the powers, rights, and remedies given by the Act are to be in addition to and not in derogation of any other powers, rights, and remedies conferred by statute, law, or custom.

[They referred to the Public Health (London) Act, 1891, ss. 2, 3, 4 sub-s. 3 (*b*), 5 sub-s. 9, 9, 13, 30, 35, 138, and 141.]

Renshaw, Q.C., and *Ingpen*, for the respondents. The nuisance in this case is not caused by any act, default, permission, or sufferance of Sir H. M. Brownrigg, who has done everything that he could reasonably be called upon to do. It is caused entirely by the acts of third parties, over whom he has no control, done without his knowledge, and generally in the night. Can the owner of unsaleable vacant land who has at his own expense surrounded it by a hoarding be compelled to employ watchmen night and day to prevent people from throwing foul refuse on to his land, and daily to employ scavengers to cart it away to some other place, and this at the relation of a sanitary authority whose duty it is to remove all sorts of filth, and who have, under the Act of 1891, the powers, and have also the means and appliances for so doing? This would be a serious burden which the Court ought not to throw upon the landowner. He does not bring these people on his land, or allow them to commit the nuisance: *White* v. *Jameson* (1); *Gandy* v *Jubber* (2); *Reedie* v. *London and North Western Ry. Co.* (3); *Reg.* v. *Watts* (4); *Reg.* v. *Bradford*

(1) (1874) L. R. 18 Eq. 303.
(2) (1864, 1865) 5 B. & S. 78, 485; 9 B. & S. 15.
(3) (1849) 4 Ex. 244.
(4) (1703) 1 Salk. 357.

Navigation Co. (1); *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2); *Conservators of River Thames* v. *Port Sanitary Authority of Port of London.* (3)

[A. L. SMITH L.J. referred to 9 B. & S. p. 15, and *Warrington, Q.C.*, referred to *Rex* v. *Pedly.* (4)]

Coming to the Act of 1891, by s. 141 the expression "premises" includes land whether open or enclosed, and whether built on or not; and (s. 1) it is the duty of every sanitary authority to inspect their district for the purpose of detecting what nuisances exist, and to put in force their powers so as to secure the proper sanitary condition of all "premises" within their district; and (s. 2, sub-s. 1) (*a*) any premises in such a state as to be a nuisance or injurious or dangerous to health, and (*d*) any accumulation or deposit which is a nuisance and dangerous to health are defined to be nuisances liable to be dealt with summarily under that Act. Then s. 4 contains provisions enabling the sanitary authority to serve notices on the person by whose act, default, or sufferance the nuisance arises or continues, or, if he cannot be found, on the owner or occupier of the premises, requiring him to abate the nuisance and do all things necessary for the purpose, and imposing penalties for non-compliance with the notice; while s. 11 makes provision for the costs and expenses of carrying nuisance orders into effect, and enables them in certain cases to be recovered from the owner of premises.

Sect. 30, again, makes it the duty of sanitary authorities to secure the due removal at proper periods of "house refuse" (an expression which by s. 141 includes rubbish and filth) from "premises," and imposes a fine upon the authorities if they fail to comply with a notice from the occupier requiring them to act under the section. Then by s. 35, where it is not the duty of the sanitary authority to remove obnoxious matter, their inspector must serve notice on the owner or occupier of the premises requiring him to remove it; and, if the notice is not complied with within forty-eight hours, the authority may themselves remove and dispose of it, and may

(1) (1865) 6 B. & S. 631.
(2) (1869) L. R. 4 C. P. 198.
(3) [1894] 1 Q. B. 647.
(4) (1834) 1 Ad. & E. 822.

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recover the expenses they have been put to from the occupier or owner.

The vestry ought to have acted under these powers, or some of them. Sir H. M. Brownrigg has always been ready to enter into any reasonable arrangement, and the plaintiffs have not made out any case for an injunction against him.

No reply was called for.

LINDLEY L.J. Looking at the matter from the point of view of the public, that is to say, with reference to the duty of the defendant, and the right of the Attorney-General, as representing the public, the case appears to me to be one of the simplest possible description.

The defendant is the owner and occupier, or possessor, of a vacant piece of land, and we are not embarrassed in this case by any of the questions which arise when the dispute is whether it is the duty of a reversioner, or of a tenant to keep the premises in proper order. We have only got the owner of the vacant piece of land to deal with. Now is it, or is it not, a common law duty of the owner of a vacant piece of land to prevent that land from being a public nuisance? It appears to me that it is. Turning to the books on criminal law to which we are accustomed to go for information about such matters as this, and taking Hawkins' Pleas of the Crown, which is one of the best, I find that in his chapter on nuisances he says (8th ed. vol. i. p. 692, s. 1), it seems that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the King's subjects, or by neglecting to do a thing which the common good requires. If the owner of a piece of land does permit it to be in such a state, e.g. smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say, "I did not put the filth on but somebody else did." He must provide against this if he can. His business is to prevent his land from being a public nuisance. A very early illustration of that doctrine is to be found in the case of *Reg.* v. *Watts*. (1)

(1) 1 Salk. 357.

That was an "Indictment for not repairing a house standing upon the highway, ruinous and like to fall down"—it was not standing across the highway, but near it—"which the defendant occupied and ought to repair ratione tenuræ suæ. The defendant pleaded not guilty, and the jury found a special verdict, viz., that the defendant occupied, but was only tenant at will, and whether he was liable was the question." Then the Court said: "The ratione tenuræ is only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier, and not to the estate, which is not material in such case as to the public."

That principle has been always followed as far as I know in criminal law, and also on information by the Attorney-General as representing the public. I cannot for a moment entertain the slightest doubt that it is the common law duty of this gentleman to prevent that piece of land from continuing as a public nuisance. That it is a public nuisance is beyond all controversy. There is no question at all about that. Under the circumstances, why is not the Attorney-General entitled to an injunction to restrain the respondent from committing a breach of that duty to the public? It appears to me it is almost a matter of course (unless there are instances to the contrary, which I will consider presently) that the Attorney-General should, on behalf of the public, have an injunction. The mere fact that it puts the wrongdoer to expense, or that it is difficult for him to get rid of it, is no defence in point of law, or any reason at all why the rights of the public should not be enforced. And bearing in mind the 138th section of the Public Health (London) Act, 1891, it is the common law aspect of the case which we must have regard to. That Act, which I will consider presently at a little greater length, gives the sanitary authority, who are in this case the united vestry, power to remove nuisances and to clean streets, and to do all sorts of things for the benefit of the public; and amongst other things,

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they could no doubt, under the circumstances in this case, have proceeded against the defendant criminally. But that is an extremely inconvenient mode of proceeding, and has been found to be so in practice. Now s. 138 says this: "All powers, rights, and remedies given by this Act shall be in addition to and not in derogation of any other powers, rights, and remedies conferred by any Act of Parliament, law, or custom, and all such other powers, rights, and remedies may be exercised and put in force in the same manner and by the same authority as if this Act had not passed." Attending only to the rights of the public, and the Attorney-General as representing the public, that is a saving of all his rights and all his remedies. With that section in the Act no other part of the Act can oust the jurisdiction of the Court to grant an injunction, if a proper case in other respects is made out.

The alleged reasons for not interfering are that the vestry is empowered by this Act of Parliament to clean such places as this at the expense of the ratepayers, and even, under s. 35, at the expense of the defendant himself. I think that is so. But upon what principle of justice can the expense of keeping this place clean be thrown upon the ratepayers? It is the common law duty of the owner to prevent this piece of land from being a nuisance. Why should the ratepayers pay for it? Now there is a clause in s. 35 under which, so far as I can follow it, I think the vestry might have taken proceedings. But the section is awkwardly framed, and the course pointed out by it would be inconvenient in practice. I do not say that it cannot be done, but the machinery provided by the section would have to be put in force constantly, and, instead of having one declaration or one injunction, there would have to be a series of different orders, assuming, of course, that the defendant did not obey and perform the duty which lies upon him. It would be an extremely inconvenient procedure to have recourse to. Under these circumstances I think the existence of that power ought not to influence us in considering whether we should grant an injunction.

Now look at the matter from a practical point of view. The defendant takes the position which one would expect from any

gentleman. He has fought for his rights. He finds that the law is against him. He says, "Do not grant an injunction against me; I will make some arrangement with the vestry by which they shall keep this place clean at my expense." That suggestion is a right and proper one. Nobody wants to put the defendant to greater inconvenience than necessary, and I do not think it is necessary for the sake of the public or anybody else now to grant any injunction; but the defendant must accept the consequences of being in the wrong. What we propose to do, therefore, is to allow the appeal, to discharge the order, and to declare that the respondent is legally bound to prevent the piece of land in question from continuing to be a public nuisance, and that the Attorney-General is entitled to an injunction to enforce the performance by the respondent of the duty which lies upon him. The Attorney-General will have liberty to apply to the judge for such injunction if necessary; and the respondent, Sir H. M. Brownrigg, must pay the costs which have been incurred—not the whole costs, but the costs of the action so far as it was dismissed against him, and the costs of this appeal. As we are dealing with gentlemen on both sides, and the vestry have far greater facilities for this kind of work, and do not want to put the respondent to the expense of getting some contractor to do it for him, I have no doubt that some arrangement as to how it is to be done will be made between the parties.

A. L. SMITH L.J. This is a proceeding by the Attorney-General at the relation of the inhabitants of St. Margaret and St. John, Westminster, as represented by the united vestries of these parishes, to restrain a nuisance in one of those parishes, or both of them. It is proved beyond doubt that a continuing public nuisance exists upon the land of Sir Henry Brownrigg, and I need not deal with that part of the case any more. But the point is taken, and has been argued, that Sir Henry Brownrigg is under no duty to abate that nuisance. Now, it seems to me it is perfectly clear that where an owner and occupier (which Sir Henry Brownrigg is) is possessed of land upon which there is a continuing public nuisance, there is a duty cast upon him to abate that nuisance.

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The judgment of Lord Blackburn in *Reg.* v. *Bradford Navigation Co.* (1) is very apposite to this point. That was the case of an indictment against the Company of Proprietors of the Bradford Navigation "for a public nuisance by collecting, impounding, and keeping exposed on the 1st July, 1864, and thence continually until the 10th August, 1864, in the Bradford Canal, ... large quantities of foul liquid filth, sewage, and polluted water." The indictment was removed by certiorari into the Court of Queen's Bench, and came on for trial in March, 1865, before Martin B., when a verdict for the Crown was taken by consent of the parties, subject to a special case for the opinion of the Court of Queen's Bench. Upon the hearing of the special case, the defence set up was that the company were not liable for that they were only using upon their own premises, that which they had a right to use, viz., the water of a beck which had been polluted not by them but by somebody else, and that the persons who fouled the water, and thus created the nuisance, were to be indicted, and not the company. That is shortly the nature of the case. In this state of things Lord Blackburn in his judgment said this (2): "There is no precise authority in point; and we must have recourse to the general principle of law. Persons who maintain their property so as to be a public nuisance are indictable." I will pause there. In this case Sir Henry Brownrigg is now maintaining this property so as to be a public nuisance, and I have no doubt upon this part of the case that he is indictable. Lord Blackburn goes on: "And the question in the present case, which concerns the occupiers, the lessees of the canal," (who were the persons indicted), "is, whether they having maintained and kept part of it in such a state as to be a public nuisance, there is anything which prevents them from being indictable?" Paraphrasing this part of the judgment, he said: "You are indictable—there is a case against you; how do you get out of it?" They answer: "The statute allowed us to bring the beck into our canal; some people upon that beck have been polluting it; and hence it is that our canal is in the state you complain of." The learned judge points out that if the statute had

(1) 6 B. & S. 631. (2) 6 B. & S. 651.

compelled the company to take that beck, and put that obligation upon them, that might be an answer to the indictment, because the company would be doing what the statute compelled them to do; but he also points out that inasmuch as the statute only authorized them to take that beck into their canal, that was no sufficient answer. They had a public indictable nuisance upon their premises, and the learned judge held, like the rest of the Court, that the indictment lay, and the company must be convicted. That is very like the point we have to decide here.

Then in the case of *Proprietors of Margate Pier and Harbour* v. *Town Council of Margate* (1), before Lush and Hayes JJ., there was an application against the sanitary authority for having a nuisance of seaweed upon their foreshore. It was a continuing public nuisance; and Lush J. said: "I have no doubt, whatever, that it is the duty of the appellants to prevent the accumulation of seaweed so that it shall not become a nuisance, and that, whether produced by natural or artificial causes,"—those words would apply to the throwing the rubbish over the hoarding here—" they are bound to remove all matter in the harbour which is a nuisance, or injurious to health." This authority, and those to which Lindley L.J. has referred, appear to me to dispose of the first point taken—namely, that there is no duty upon Sir Henry Brownrigg to prevent this piece of land from continuing to be a public nuisance, for in my judgment there is such a duty.

The next point is that the vestry ought to have done the work themselves under the powers conferred by the Public Health (London) Act, 1891, s. 35. But is not that exactly the defence raised in *Reg.* v. *Bradford Navigation Co.* (2)? It was; and this is how Lord Blackburn dealt with it. He said (3): "Inconvenience to the public and to the company may be occasioned if, from the want of pure water, the supply of water in the canal runs short; but that can afford no justification for the defendants creating a nuisance. It throws on them the necessity of taking legal steps to compel the local

(1) 20 L. T. (N.S.) 564, 568.
(2) 6 B. & S. 631.
(3) 6 B. & S. 652.

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board of health to do their duty in cleansing the beck, or, if that be found an inefficient remedy, to obtain a private Act of Parliament for the purpose." Supposing the argument on behalf of Sir Henry Brownrigg was right, and that it was the duty of the vestries to clear this piece of land, what answer is that to the information of the Attorney-General, who alleges there the existence of a public nuisance upon Sir Henry Brownrigg's land, which Sir Henry is bound to abate? None at all. As pointed out by Lord Blackburn, if it be the duty of other persons to do it, it is the landlord's duty to make those other persons perform their duty. It is no answer to the information of the Attorney-General on behalf of the public to say somebody else ought to do the cleansing. I doubt very much myself whether or not Mr. Renshaw, with all his ingenuity, can shew that this duty of doing cleansing work in such a case as this is thrown upon the sanitary authority either by the 30th or the 35th sections. He can only do so by reading in the interpretation clause, s. 141; and by reading in that clause he does with great difficulty squeeze this case within the sections I have mentioned. But as Lindley L.J. has pointed out, the expressions specified in s. 141 are to have the meaning therein given "unless the context otherwise requires." I do not think that the context, either in s. 30 or s. 35, is favourable to Mr. Renshaw's contention. Although I am not deciding the point absolutely, I may say that I doubt very much whether these sanitary authorities—that is, in this case these vestries—can be forced to do what it is contended it is their duty to do.

But be that as it may, as I have already pointed out, that is no answer to the information of the Attorney-General, because, having regard to s. 13 and s. 138, it seems to me the jurisdiction of this Court on information by the Attorney-General is left absolutely untouched. Sect. 13 says, "The sanitary authority may, if in their opinion summary proceedings would afford an adequate remedy,"—which in their opinion in this case it does —"cause any proceedings to be taken against any person in the High Court to enforce the abatement or prohibition of any nuisance liable to be dealt with summarily under this Act."

That would seem to shew their position if they go to the Attorney-General and get him to take proceedings as he has done in the present case. If not, s. 138, which I am told was not called to Kekewich J.'s attention, seems to me to be conclusive on the subject. [His Lordship then read that section, and continued:—]

This action at the relation of the Attorney-General may accordingly be dealt with as if the Act of 1891 had not been passed, and, there being this continuing public nuisance upon the land of Sir Henry Brownrigg, he is bound to abate it, and an injunction ought to go.

I wish to add one more observation. We have heard a good deal about the impossibility of Sir Henry Brownrigg being able to obey the injunction. The injunction is not going at present. If this piece of land had been occupied and used by Sir Henry Brownrigg as a market garden, he would have found means to prevent the nuisance without any difficulty. I am perfectly satisfied that this is so, and I am of opinion the appeal should be allowed.

RIGBY L.J. In this case, down to the present time, Sir Henry Brownrigg has denied his liability to abate the nuisance occurring on his property. It is also argued on his behalf that because the vestry deny their liability an injunction should not be granted against him. Upon those points, I think he is entirely in the wrong. There is a common law liability on the part of the owner or occupier of land to abate a nuisance arising thereupon; that is to say, whenever he becomes aware that there is a nuisance, the duty to abate it at once arises. In some cases a man who is not the owner subjects himself to indictments for neglect of such a duty, as, for instance, a tenant at will only, as in the case in *Reg.* v. *Watts* (1), if he allows a dangerous nuisance to remain upon the land of which he is occupier. What is there peculiar in that? Mr. Renshaw tried to distinguish that case on account of the ownership. I do not think the tenant at will is owner in any sense, or

(1) 1 Salk. 357.

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that it makes any substantial difference. He is there as tenant at will, and there is the dangerous structure. If it falls down, it may injure some one passing by. I cannot, in point of principle, distinguish a case of dangerous structure and a nuisance in the nature of injurious effluvia that come from the land. It seems to me, when you take the common law point of view, there is only the alternative of allowing the nuisance to go on indefinitely, or making liable the one person who can abate it, whether the owner or occupier. So I have no doubt about the existence of that common law liability.

In reference to the next point, that the position is altered by the statute, reading s. 138—which, by the way, does not appear to have been called to Kekewich J.'s attention—it appears to me that without further inquiry that argument must fail. The statute says that you are to have the same remedies as though the Act had never been passed; that is to say, you are to have all your common law remedies as though this statute, at any rate, was not in existence. That means that you are to disregard for the purpose of remedy everything that there is in this statute.

Now, I do not mean to say that, if it were clearly shewn that the vestry had been acting in a vexatious manner, that circumstance might not be taken into consideration; but I do not find that at all. I asked for any clear admission that had ever been made by Sir Henry Brownrigg that he was liable, and there is none to be found. Under these circumstances we do not really need to consider the difficulty in which he may be placed if an injunction is granted. He has not tried to do anything really practicable to get rid of this nuisance. I cannot imagine that the flimsy sort of hoarding that he has put up, and allowed to be pulled down to any extent, is what you might call a serious attempt. Down to the present time he has contended that he is not liable and the vestry is; but there are authorities against him, and we may expect a gentleman of his position to realize what is reasonable. It is the Attorney-General on behalf of the relators that we must really care for here; and being assured that the vestry have the matter

under their consideration, and seeing that on both sides there is a likelihood of a reasonable settlement of the difficulty now that the rights are established, I think that the contention will best be settled by declaring the Attorney-General entitled to an injunction, and giving him liberty to apply. No doubt that will lead to something which will render an injunction unnecessary.

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Solicitors: *J. C. F. Warrington Rogers*; *Last & Sons.*

W. W. K.

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C. A. 1896 NORTH J. *Nov.* 17, 18, 19 20, 21, 24; *Dec.* 21. C. A. 1897 *Feb.* 18, 19, 20, 22; *March* 6.

Company — Shareholder — Rectification of Register — Underwriting Letter — Acceptance — Principal and Agent — Authority to apply for Shares — Estoppel.

By an underwriting letter, addressed to the Mines Company, Stark offered to subscribe or find subscribers, on or before September 21, for 10,000 shares, "or such less number as may be accepted by you," in the Consort Company, which the Mines Company were promoting, "and, in the event of my failing to comply with the terms herein stated, I authorize you as my agent, on my behalf and in my name, to apply for the number of shares (full or reduced, as the case may be) guaranteed by me as above." It was agreed that the letter was irrevocable, provided that 40,000 shares were underwritten or applied for prior to the public issue of the prospectus of the Consort Company, and allotment made on or before September 30. No notice of the acceptance of this offer was sent to Stark, but a form of acceptance at the foot of it was signed by the secretary of the Mines Company. The Consort Company having been registered, the Mines Company, without any previous notice to Stark, applied on his behalf for an allotment to him of shares in the Consort Company, and 9000 shares were accordingly allotted to him and registered in his name. Upon a motion by Stark to rectify the register by omitting his name:—

Held, by the Court of Appeal, that the underwriting letter did not constitute a contract binding Stark to take shares until it had been accepted by the Mines Company and notice of acceptance had been given to him; that the authority to the Mines Company to apply for shares in his name did not arise until he had been informed by that company of the number of shares for which they accepted his offer, and he had failed to apply himself for that number; that he was not estopped as against the Consort Company from denying the authority of the Mines Company to apply for

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shares in his name; and that he was entitled to have his name removed from the register of members of the Consort Company.

Decision of North J. as to estoppel reversed.

Ex parte Harrison, (1893) 69 L. T. (N.S.) 204, distinguished.

MOTION by Robert Stark, under s. 35 of the Companies Act, 1862, asking that the register of members of the above company might be rectified by removing his name therefrom as the holder of shares therein.

A company called the Mines Acquisition and Development Company promoted the formation of the Consort Deep Level Gold Mines, Limited, for the purpose (inter alia) of purchasing and developing two mining properties in Africa, the option of purchasing which the Mines Acquisition Company had acquired. The Consort Company was registered on September 13, 1895, with a nominal capital of 120,000*l.* in 120,000 shares of 1*l.* each. Mr. J. Akerman was the secretary of both the companies. The price to be paid to the Mines Acquisition Company for the two properties was 80,000*l.*, of which 20,000*l.* was to be paid in cash, 40,000*l.* in fully paid-up shares of the Consort Company, and 20,000*l.* in fully paid shares, or cash and fully paid shares, at the option of the directors of the Consort Company.

The Mines Acquisition Company had some "underwriting letters" for shares in the Consort Company prepared, and on September 11, 1895, a Mr. Lambert, a financial agent, induced Stark to sign one of the letters.

The letter which Stark signed on September 11 was as follows:—

"The Consort Deep Level Gold Mines, Limited.
"Capital, £120,000.
"In 120,000 shares of £1 each.

"To Mr. J. Akerman,
"Secretary Mines Acquisition and Development
"Company, Limited,
"Bartholomew House, London, E.C.

"With reference to the prospectus of the above company, offering 80,000 shares of the company for public subscription, and in consideration of your agreeing to pay to me a commis-

sion of 15 per cent., payable 5 per cent. in cash, 10 per cent. in shares, on the amount of shares for which you accept this contract as below, I hereby undertake to subscribe or find responsible subscribers to your satisfaction, on or before the day after the day appointed for the closing of the list for subscriptions for shares, and on the terms stated in the said prospectus or any reasonable modification thereof, for 10,000 shares of £1 each, or such less number as may be accepted by you, and to pay the instalments on the dates specified in the said prospectus, and I herewith hand you my cheque for 2*s.* 6*d.* per share deposit.

"It is a condition of this agreement that, in the event of 40,000 shares being subscribed for by the general public on the issue of the said prospectus at or before the closing of the list, my guarantee is to cease, but all subscriptions by the public after the prospectus is publicly advertised to the date of first allotment shall be applied pro ratâ in reduction of the amount so guaranteed.

"It is agreed that I am to receive the said commission upon the amount guaranteed by me within 14 days of the completion of the purchase.

"It is further agreed that this underwriting letter is irrevocable, provided always that 40,000 shares are underwritten or applied for prior to the public issue of the said prospectus, and allotment made on or before the 30th day of September, 1895.

"In the event of my failing to comply with the terms herein stated I authorize you as my agent, on my behalf and in my name, to apply for the number of shares (full or reduced, as the case may be) guaranteed by me as above, and to hand such application, together with my cheque, to the company, which application and agency I hereby undertake not to withdraw.

"My liability under this agreement shall continue, notwithstanding any variations between the prospectus shewn to me and the prospectus issued to the general public, so long as the nominal capital of the company and the amount fixed for the purchase consideration shall remain the same."

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At the foot of the letter was the following memorandum of acceptance:—

"The above contract is accepted by me to the extent of shares underwritten.

"Date 1895."

Stark did not hand any cheque for the deposit with the underwriting letter to either Lambert or the Mines Acquisition Company. After Stark had signed the letter it was handed by Lambert to Akerman, and he, on September 12, signed the form of acceptance, having previously filled in the blank in it for the number of shares with the figures "10,000." Akerman simply signed his own name, not adding to it his description as secretary of the Mines Acquisition Company. No notice of the acceptance by the Mines Acquisition Company of the proposal made by the underwriting letter was ever sent to Stark.

The Consort Company having been registered on September 13, the prospectus was issued to the public on September 14, and was advertised in various newspapers. The days fixed for the closing of the lists of applications were September 17 for town, September 18 for the country, and September 20 for the Continent. Before the registration of the company underwriting letters to the extent of 40,000 shares had been signed by various persons and delivered to the Mines Acquisition Company.

The first meeting of the board of directors of the Consort Company was held on September 27. It then appeared that the applications by the public for shares in the company amounted to 3960 shares only. Applications on behalf of the different underwriters (including Stark) for 36,000 shares altogether were handed in by the secretary, the underwriting letters being produced. These applications were all dated September 26, and were signed by Akerman, as agent, on behalf of Stark and the other underwriters. The board resolved to allot 39,960 shares to the several applicants named in, and in accordance with, the number of shares appearing opposite their respective names in the applications and allotment sheets. On September 27 or the next day notices of allotment were sent out to the applicants for the 3960 shares.

On September 28 a circular letter was sent to each of the underwriting applicants, informing him of the application which had been made on his behalf, each letter being headed "Consort Deep Level Gold Mines, Limited," and signed "pro Mines Acquisition and Development Company, Limited. J. Akerman, Secretary."

The letter had at the head of it the address of the office of the Mines Acquisition Company.

The material part of the letter sent to Stark was as follows:—"Public subscriptions to the above amounting only to 4000 shares, we have to call upon our underwriters for 90 per cent. of the 40,000 underwritten. In accordance with the agreement made with you we have applied for 9000 shares on your behalf, for which please send me £4,500, viz. 2*s*. 6*d*. application and 7*s*. 6*d*. allotment, by cheque payable to Consort Deep Level Gold Mines. In return I will forward you allotment letter for 10,000 (*sic*) shares and remit you our own cheque for £1000 commission due to you, as well as a certificate for 1500 bonus shares of £1 each fully paid in the Consort Deep."

On October 11 (not before) allotment letters were sent by the Consort Company to the respective underwriting allottees. The letter to Stark informed him that the board of directors of the Consort Company had at their meeting on September 27 allotted to him 9000 shares of 1*l*. each in the company in pursuance of his application, and requested him forthwith to pay 4500*l*. (10*s*. per share) to the company's bankers. Stark never made any payment in respect of the shares, and he declined to receive any underwriting commission. Meanwhile, on September 30, Stark had consulted Mr. Payne, his solicitor, and Payne on his behalf wrote on the same day a letter, addressed to the secretary of the Mines Acquisition Company, as follows:—

"Consort Deep Level Gold Mines, Limited.

"Dear Sir,—I have been consulted by my client, Mr. Robert Stark, with reference to your letter to him of the 28th inst. As Mr. Stark's offer of underwriting was never accepted by your company, I fail to see how you can ask him to take up

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the shares in question, and, acting under my advice, he will refuse to do so."

In reply to this letter Messrs. Lucas & Ward, the solicitors of the Mines Acquisition Company, wrote, on October 10, to Mr. Payne: "Your letter of the 30th ult. has been handed to us. Mr. Robert Stark's underwriting agreement is before us, and being in proper order the Mines Acquisition and Development Company, Limited, will hold him responsible under it."

On October 12 (after the receipt by Stark of the letter of allotment) Mr. Payne wrote to Akerman, as secretary of the Consort Company, as follows:—

"As you are doubtless aware, in your capacity of secretary of the Mines Acquisition and Development Company, I wrote on the 30th ult. to that company repudiating, on my client Mr. Robert Stark's behalf, the underwriting of the Consort Deep Level Gold Mines, and I now beg to confirm that letter, and to inform you that Mr. Stark will refuse the allotment of shares mentioned in the allotment letter of the 11th inst. sent him by you."

Further correspondence took place between Mr. Payne and both companies and their solicitors, Mr. Payne on behalf of Stark insisting on the repudiation of the shares, and both companies insisting that Stark was bound to take the shares, and demanding payment of the 4500*l.*

Stark's name was entered in the register of shareholders of the Consort Company as the holder of 9000 shares, and ultimately, as the company declined to comply with his demand that his name should be removed, notice of this motion was given on January 7, 1896.

In addition to the objection raised by Mr. Payne on Stark's behalf with reference to the acceptance of the underwriting letter, Stark alleged that he had been induced to sign the letter by misrepresentations contained in the prospectus of the company, as well as by a verbal misrepresentation made by Lambert. It is considered unnecessary to report the case on this point.

The motion came on for hearing before North J. on November 17, 1896.

Swinfen Eady, Q.C., and *W. F. Hamilton*, for the motion. (1.) The Mines Acquisition Company never accepted the offer made by Stark in the underwriting letter, or, at any rate, no notice of their acceptance was ever given to him. Stark never paid the 2*s.* 6*d.* per share deposit mentioned in the letter.

(2.) The underwriting letter was revocable, and it was in fact revoked by Stark before any notice of allotment of shares in the Consort Company had been given to him. No allotment was made before September 30, the date mentioned in the letter, and, that being so, the provision that the letter should be irrevocable did not apply. An allotment of shares is not complete until notice has been given to the allottee: *Hebb's Case.* (1)

Bigham, Q.C., and *Upjohn*, for the Consort Company. Stark authorized Akerman to apply on his behalf for shares in the Consort Company, and in pursuance of that authority the application was made. The application was accepted and was followed by allotment, of which notice was given to the applicant. A contract to take the shares was thus constituted. The authority to apply for the shares was given to Akerman personally, and was so accepted by him. The attempted withdrawal by Stark before notice of allotment had been given to him was of no avail, because he had expressly agreed that his offer was to be irrevocable, except in certain events which did not happen: *Carmichael's Case.* (2) The authority was coupled with an interest. Nor is Stark entitled as against third parties to set up that he had no notice of the acceptance of his offer contained in the underwriting letter. On the face of the letter it appeared to be duly accepted, and, as against third parties to whom it was shewn and who acted upon it, Stark is estopped from saying that there was no valid acceptance because no notice of acceptance was given to him: *Ex parte Harrison.* (3)

Swinfen Eady, Q.C., in reply. The underwriting contract was intended to be made with Akerman as representing the Mines Acquisition Company, not with him personally, and there was never any valid acceptance by that company. The company never in fact accepted the offer, and they never authorized

(1) (1867) L. R. 4 Eq. 9. (2) [1896] 2 Ch. 643.
(3) 69 L. T. (N.S.) 204.

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Akerman to accept on their behalf. The deposit which was to be paid on application was never paid by Stark, and he could not have sued the company for his commission. In *Ex parte Harrison* (1) the offer to underwrite was made to an individual, and on the face of it he appeared to have accepted it, and the document appeared to be in order. That was not so in the present case, and no estoppel can arise.

The authority given by the underwriting letter cannot be separated from the contract: *Carmichael's Case*. (2) If Stark is entitled to rescind his contract, the authority to apply on his behalf equally comes to an end. There being no contract between Stark, the principal, and the Consort Company that he would not withdraw his application before allotment, he was at liberty to do so. The two companies having the same secretary, and being in other ways closely connected, the Court will infer that the letter of Stark's solicitor repudiating the shares came to the knowledge of the directors of the Consort Company before they sent the notice of allotment to Stark. The refusal to accept shares was tantamount to a withdrawal of the application.

Cur. adv. vult.

1896. Dec. 21. North J., after stating the facts and deciding that the offer made by the underwriting letter was made to the Mines Acquisition Company and not to Akerman as an individual, and that it was accepted by him on behalf of the Mines Acquisition Company, continued:—

It seems to me that the allotment was made when the resolution was passed on September 27, and when the notices of allotment were sent out to a considerable body of applicants on September 28; and the fact that some applicants did not receive notice of allotment until after September 30 does not, in my opinion, prevent that which took place from being an allotment on or before September 30 within the meaning of the underwriting letter.

Assuming, then, that the allotment was made in time, the next question is, whether the underwriting letter was accepted.

(1) 69 L. T. (N.S.) 204. (2) [1896] 2 Ch. 643, 647.

I have read the acceptance signed by Akerman on September 12, that is, before the issue of the prospectus. There was a dispute as to the time when the acceptance was signed by Akerman, but it was clearly established by the evidence that it was signed on September 12.

Then the next point is this—that, assuming that the letter was accepted, no notice of acceptance was given to Stark. The principal ground put forward in Mr. Payne's letter of September 30 was this: "As Mr. Stark's offer of underwriting was never accepted by your company, I fail to see how you can ask him to take up the shares in question."

Was, then, notice of acceptance necessary? I think it was as between the Mines Acquisition Company and the underwriter. In any case, I think the underwriter would have a right to know what his limit of liability was, whether it was the 10,000 shares which he offered to underwrite if his offer was accepted, or whether it was to be a smaller amount; and in the present case I think it was especially necessary that the offer should be accepted, because the underwriting letter contained an offer to take "10,000 shares or such less number as may be accepted by you, and to pay the instalments on the dates specified in the prospectus, and I herewith hand you my cheque for 2*s*. 6*d*. per share deposit." When Stark signed the underwriting letter he gave no cheque for the deposit, and therefore he had not made the offer in the terms proposed by the letter. It was essential, therefore, that he should know whether the Mines Acquisition Company had or had not accepted his offer, because, so long as the offer was either not accepted, or, if it was, the acceptance was not communicated to him, Stark would always be in this position: if the 40,000 shares had been applied for by the general public his guarantee would not have been required, and would not in the result have had any force, but he would have been still entitled to the commission of 15 per cent. upon the 10,000 shares; if his offer had not been accepted because the deposit was not tendered, the company might have said to him, "We do not owe you any commission, for you never made any application to us in the terms required by signing the letter and handing us your cheque." It was essential,

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therefore, for Stark to know whether his offer was accepted or not.

The next question is, whether he had notice of acceptance. I think it is clear that he never had any notice whatever that he had been accepted as an underwriter. On September 27 application was made in his name to the Consort Company for an allotment of shares, and the question is, whether the non-communication of the acceptance to him made his offer invalid. As regards the Consort Company, in my opinion it did not. It is not shewn that the Consort Company knew that it had not been accepted. In fact it had been accepted, although the acceptance had not been communicated to Stark. But he cannot be heard to say as against the Consort Company, to whom the Mines Acquisition Company or Akerman had handed the application for shares in Stark's name, that the acceptance had not been given. The acceptance which was intended to be written upon the face of the underwriting letter had been written upon it long before that date, and the signing of that letter by Stark and handing it to the Mines Acquisition Company furnished that company, or Akerman, with an ostensible authority to apply for and accept shares in Stark's name and on his behalf, he undertaking not to withdraw it, and that acceptance was before the Consort Company.

This point is entirely covered by authority, namely, that, however the matter might have stood between Stark on the one hand and the Mines Acquisition Company on the other, Stark was estopped from setting up as against the Consort Company the fact that notice of the acceptance by the Mines Acquisition Company had not been communicated to him. The recent decision of the Court of Appeal in *Ex parte Harrison* (1) is conclusive upon this point.

Several other points were raised to which I must refer. It was said that the authority conferred upon the Mines Acquisition Company or Akerman was to apply on Stark's behalf and in his name, and "to hand such application together with my cheque" to the company, and it was said that the application made to the Consort Company was not accompanied by Stark's

(1) 69 L. T. (N.S.) 204.

cheque. But in fact Stark had never handed his cheque to the Mines Acquisition Company, and it is not, in my opinion, open to him to set up that the Mines Acquisition Company did not with their application hand to the Consort Company the cheque which ought to have been handed by him to them, but which had not in fact been so handed. So far as the Consort Company were concerned the application was made to them by the Mines Acquisition Company, the promoters, and the handing over of the cheque seems to me to be a matter which they might waive if they liked, and which is not material; and at any rate the omission to hand over a cheque which Stark had omitted to give is not a thing which he can be heard to set up.

Then, again, it is said that the application for the shares ought to have been made by the Mines Acquisition Company, whereas in fact it was made by Akerman. It is said that it should have been made by the Mines Acquisition Company if they were the principals, and in point of fact it is signed "J. Akerman, agent." The important matter, however, was that it should be made in Stark's name; and it was made by Akerman in his name, and the allotment was made in accordance with the application.

Then it is said that no authority was given by the Mines Acquisition Company to Akerman to make the application. I think there is ample evidence of authority. The letter of September 28, in which they say "we have applied," seems to me ample evidence of authority; and there are other letters to the same effect, all throughout treating the Mines Acquisition Company as the principals to the contract. And although objections of all kinds were taken to Stark's liability, none were suggested upon that ground. In my opinion there was no good ground for it.

Further, it is said that Akerman signed the application as "agent," and that he could only sign as agent for the Mines Acquisition Company, and that a delegation by them of an authority given to them would be invalid. In my opinion it was not a delegation of authority. The employment of Akerman was merely that of their servant or officer, their

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secretary, to make the application in their name; and I think that was sufficient.

Again, it was said that Stark's application was revoked by him before the notice of allotment was sent to him on October 11. I confess that this is a point with respect to which I might have felt some difficulty in the absence of authority. Stark authorized the Mines Acquisition Company to apply for shares in his name, and they did apply. There was a lapse of fourteen days before notice of allotment was sent to him. Supposing that Stark in that interval withdrew his offer, is that a ground upon which he can decline to accept the allotment when made, or is the Consort Company entitled to say, "You had contracted that your offer should be irrevocable, and it is not open to you to withdraw it"?

I confess that, in the absence of authority, I should have thought a great deal might be said in favour of the view that, if a person who has authorized an application for shares to be made in his name does not receive notice of allotment for a fortnight after the allotment is made, he has a right to withdraw his offer in the meantime; and the fact that he had arranged with a third party that he would not withdraw his offer could not be taken advantage of by the company to whom the application had been made in his name. Although, no doubt, the Mines Acquisition Company might have had a right of action against Stark for breach of contract in withdrawing his application, in respect of which breach he might be liable to them in damages, that is a totally different matter from saying that as against the Consort Company he could not revoke his application, and that they could recover from him 9000*l.* as the price of the shares. I might have felt a difficulty upon this question but for an authority which seems to me to be exactly in point—I mean the recent decision of the Court of Appeal in *Carmichael's Case*. (1) An attempt was made to distinguish that case from the present; but I think there is nothing substantial in the differences which were pointed out.

But there is also a second answer to the objection that the application was revoked by Stark. Supposing that he had

(1) [1896] 2 Ch. 643.

power to revoke it, I cannot find that he did in fact revoke it, and I hold that he did not. The only way in which it is said that he revoked it is by Mr. Payne's letter of September 30. But that letter was addressed to the Mines Acquisition Company, and not to the Consort Company, and what Mr. Payne said in it was, "As Mr. Stark's offer of underwriting was never accepted by your company, I fail to see how you can ask him to take up the shares in question, and, acting under my advice, he will refuse to do so." So far from that being a revocation of the authority to make the application for shares, it alleges that the authority to make the application did not exist, which is a totally different matter. This letter, therefore, was not a revocation by Stark of his application, even if he could have revoked it.

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This disposes of the legal points.

[His Lordship then dealt with the alleged misrepresentations, as to which he held that Stark had failed to establish any case for the omission of his name from the register. The motion was accordingly refused with costs.]

W. L. C.

From this decision Stark appealed, and the appeal was heard on February 18, 19, 20, 22, 1897. C. A.

Swinfen Eady, Q.C., and *W. F. Hamilton*, for the appellant. To create a binding contract, the acceptance of Stark's offer to underwrite was necessary, and the acceptance did not come until too late, that is, not until after the revocation of his offer. There can be no acceptance in law of an offer until notice has been given to the person who has made it, and the notice must be given to that person himself. Notice of the acceptance was necessary, moreover, because the company were not in a position to know, at the time the offer was made, how many shares Stark would be required to underwrite. At the most, this was an offer to subscribe for as many shares as might be required: till acceptance specifying the number of shares, there was and could be no contract: *Hindley's Case*. (1) There should be such

(1) [1896] 2 Ch. 121, 125.

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an acceptance as involves notice to the person making the offer. Then Akerman was not the person to accept: the persons to accept were the persons to whom the offer was made, namely, the Mines Acquisition Company. Again, Stark had no notice of allotment until October 11, that is, after the repudiation of the transaction; and it is clear that until allotment has been communicated to the allottee he does not become a shareholder, and there is no contract. The decision in *Carmichael's Case* (1), on which the learned judge below relied, comes to this—that when there is an offer, followed by acceptance and notice, so as to constitute a complete contract for value, the person who has entered into that contract cannot withdraw from it at his will and pleasure. (2) But that does not apply here; and moreover in that case the authority given by the underwriter to apply for shares was an authority coupled with an interest, which distinguishes that case from the present. Though an agent may have authority to make a binding contract, yet the principal may withdraw that authority. Then it is said that Stark has made a representation of an existing fact, namely, that he had given authority to Akerman to apply for shares in his, Stark's, name, and that therefore he is estopped from denying that authority; but the letter to Akerman shews that this authority was only to arise "in the event of Stark's failing to comply with the terms"; and there is no evidence of any such failure. The doctrine of estoppel has, therefore, no application, and the case is brought within such authorities as *Freeman* v. *Cooke*. (3) *Ex parte Harrison* (4), relied on by the learned judge below, goes to the very verge of the law as to estoppel; and we submit that, although the decision in that case may have been right, some of the observations went too far. Upon the whole we submit that the appellant is not liable as a shareholder.

Bigham, Q.C., and *Upjohn*, for the Consort Company, were only called upon to argue the question whether under the circumstances Stark was estopped from denying that Akerman had his authority to apply for shares, and that the shares were allotted to him, Stark, by his authority.

(1) [1896] 2 Ch. 643.
(2) Ibid. 647.
(3) (1848) 2 Ex. 654.
(4) 69 L. T. (N.S.) 204.

This question depends upon the extent of knowledge attributable to the Consort Company, whose shares Stark offered to underwrite. If the Consort Company are to be taken as knowing all the facts, and that formal notice of acceptance had not been given to Stark, then, no doubt, there is no estoppel as against Stark. But had the Consort Company this knowledge? It is said they had, because Akerman was secretary of that company, as well as of the Mines Acquisition Company to whom the offer was made. But the knowledge of the secretary of one company, who is also the secretary of another company, is not necessarily the knowledge of that other company: *In re Hampshire Land Co.* (1) Supposing, as the secretary of Company A, he makes a wrong statement as to the effect of a contract made by that company, is that statement to be held binding on, or as notice to, Company B, merely because he is also secretary to Company B? As to the objection that the number of shares for which Stark was to subscribe was left uncertain in the underwriting letter, and that he never had any opportunity of applying himself after the number had been ascertained, it was never intended that he should himself make the application. The case is really governed by the decision of Chitty J. in *In re Bultfontein Sun Diamond Mine.* (2) The only difference between that case and the present is this—that in the former the number of shares was fixed in the underwriting letter. When the form of acceptance at the foot of the letter had been filled up by Akerman, the effect was the same as if the number of shares had been written in the body of the letter. Stark had given authority to Akerman to fill it up. The underwriting letter here did not contain the words "when called upon," as the letter in the *Bultfontein Case* (2) did. If Stark had applied to the Consort Company for 10,000 shares, they would have allotted that number of shares to him, and he would have been bound to take them. The Consort Company were not parties to the underwriting letter. On September 21 Stark could not tell what number of shares he was to subscribe for, because he was entitled to a reduction in respect of shares subscribed for by the public down to the date of allotment. If

(1) [1896] 2 Ch. 743. (2) (1896) 12 Times L. R. 461.

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the appellant is to succeed, *Ex parte Harrison* (1) must be overruled.

Cur. adv. vult.

March 6. LINDLEY L.J. The substantial question on this appeal is whether the company is entitled to retain Mr. Stark on its register of members in respect of shares allotted to him under the terms of an underwriting letter signed by him. I will state no more facts than are necessary in order to make my judgment intelligible. The Consort Deep Level Gold Mines, Limited, was registered on September 13, 1895. It was promoted by the Mines Acquisition and Development Company, of which Mr. Akerman was the secretary. This company had some underwriting letters for shares in the Consort Company prepared, and on September 11 Stark signed one of them. [His Lordship read the underwriting letter, and continued:—] No cheque for the 2*s.* 6*d.* deposit money was given by Stark. The day for closing the list of subscriptions was September 20. September 21, therefore, was the day on or before which Stark was to subscribe or find subscribers for shares. But, until informed of the number of shares for which he was to subscribe or to find subscribers, he could not perform his part of the bargain. On September 12 Akerman filled up and signed the form of acceptance printed at the foot of the letter. No notice of this acceptance was sent to Stark. On September 27 the directors of the Consort Company met. Akerman was its secretary, and he laid Stark's letter before the board and applied for 9000 shares in his name, and it was resolved to allot 9000 shares to him. On September 28 Akerman informed Stark of what had been done. On September 30 Stark, by his solicitor, Payne, repudiated the transaction. These two letters were written respectively from and to the Mines Company. On October 10 the solicitors of that company, Lucas & Ward, wrote to Payne, saying that the Mines Company would hold Stark responsible under his underwriting letter. On October 11 an allotment letter of 9000 shares was sent to Stark, and he was required to pay the allotment money. This he refused to do by a letter

(1) 69 L. T. (N.S.) 204.

written on October 12 by Payne to Akerman, as secretary of the Consort Company. On January 7, 1896, Stark applied to the Court to have his name removed from the register of shareholders, and his motion was on December 21 last dismissed with costs. From this decision he has appealed to this Court. He rests his application on the following grounds—namely, (1.) that Akerman had no authority to apply for shares in his name; (2.) that, if Akerman had authority, it was obtained by misrepresentations of which the company cannot take advantage; (3.) that Stark has done nothing which estops him from denying Akerman's authority. I have not alluded to the representations made to Stark, on the faith of which he says he was induced to sign the underwriting letter; and I pass this part of the case over for the present. I will first consider Akerman's authority to apply for shares in Stark's name. The 9000 shares having been allotted to Stark on Akerman's application, Stark's obligation to accept them depends on the answers to be given to the following questions—namely, Had Akerman authority to apply for them in Stark's name? If not, has Stark so represented Akerman's authority or so conducted himself as to be estopped from denying that authority? In speaking of Akerman I speak of him as the secretary and agent of the Mines Acquisition and Development Company, Limited, and I use his name for the sake of brevity only. First, as to Akerman's real authority to apply for shares in Stark's name. The underwriting letter signed by Stark was so worded that it cannot be regarded as an acceptance by him of an offer made to him by Akerman, so as to be binding on either or both of them when Stark signed it. The terms of the letter shew that it was an offer by Stark, which required acceptance by Akerman in order to convert the offer into a binding contract. Further, it is familiar law that the mere acceptance of an offer, unless it is brought to the knowledge of the person making it, does not, as a rule, convert the offer into a contract. There are exceptions to this rule, based in some cases on the ordinary course of business, and in other cases on special circumstances which render notice unnecessary. Notice of performance by the other side is often all the notice of the acceptance of the offer

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which the person making it can require: See *Carlill* v. *Carbolic Smoke Ball Co.* (1) In my opinion this may often be the case with underwriting agreements. I do not accept the view that they are like bets, and must be accepted before the event on which they are to become operative is known. Speaking generally, an underwriter of shares agrees to take so many, not exceeding a certain number, as a company may require in order to make up the total number without which business cannot be commenced; and, until the company knows how many it wants from the underwriter, I do not see how it can be in a position to accept his offer. Upon this point I concur with the view taken by Kay L.J. in *Hindley's Case*. (2) But, of course, attention must be paid to the terms of the underwriting letter in each particular case. In *In re Bultfontein Sun Diamond Mine* (3) the terms were such that notice of acceptance was inferred from the retention of the letter by the person to whom it was addressed, without more. But no such inference can be fairly drawn in the present case, as the number of shares for which the letter was accepted had to be communicated to the underwriter. According to the terms of the letter signed by Stark it was essential that he should know on or before September 21, 1895—i.e., the day after the day appointed for the closing of the list for subscriptions for shares—for how many shares he was to subscribe or find subscribers. This stipulation rendered it essential that his offer should be accepted, if at all, before that date, and that he should be informed of the number of shares for which it was accepted. Further, Akerman's authority to apply for shares in Stark's name only arose on his failure to apply for the shares which he was bound to take. But, until Stark was informed that his offer had been accepted, and of the extent to which it had been accepted, it was impossible to treat him as having failed to perform his obligation to apply for shares. Akerman's authority, therefore, to apply for them in his name never really arose. So far I agree with the view taken by North J. He, however, decided that Stark was estopped from denying Akerman's authority to apply for shares in his name;

(1) [1893] 1 Q. B. 256, 262. (2) [1896] 2 Ch. 135.
(3) 12 Times L. R. 461.

and the learned judge came to this conclusion on the authority of the decision of this Court in *Ex parte Harrison* (1), which, however, was a very different case from the present. The facts in *Ex parte Harrison* (1) may be shortly stated as follows: Harrison (who carried on business under the name of Pearson & Co.) had signed an underwriting letter, which had been accepted by the person to whom it was addressed—i.e., Lakeman. By that letter Harrison agreed to subscribe, or find subscribers, for 300 shares (neither more nor less) in a brewery company, and to apply for them on a particular day; and, in the event of his not applying for them on that day, he empowered Lakeman to apply for them in his name. So far as appeared by that letter, there was no condition whatever for the exercise of this power, except (1.) the non-application by Harrison for 300 shares on the day named; and (2.) the acceptance by Lakeman of the offer made by the letter to him. Harrison had not applied for the shares, and the acceptance of the offer appeared from Lakeman's signed acceptance on the document itself. In another document (of which the company had no knowledge or notice) Harrison had stipulated that the acceptance of his offer by Lakeman should be communicated to him by a particular day. This was not done, nor was Harrison ever in fact informed before shares were allotted to him that Lakeman had accepted his offer. The Court held that Harrison was estopped from denying that Lakeman had authority to apply for 300 shares in his name. That case turned entirely on the private letter. The case was fought and decided with reference to that, and what was said about estoppel was addressed to the controversy there raised. Whether what was said about estoppel would have been applicable if there had been no private letter, it is unnecessary to consider. The point can be reconsidered when it arises, and *In re Bultfontein Sun Diamond Mine* (2) can be considered with it. In the present case, as I have already pointed out, the apparent, as well as the real, authority conferred by Stark on Akerman to apply for shares in Stark's name, arose only on the happening of a very important event, which is

(1) 69 L. T. (N.S.) 204.
(2) 12 Times L. R. 461.

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thus expressed in the letter itself: "In the event of my failing to comply with the terms herein stated." In order, therefore, to render the principle of estoppel applicable to this case, the company must shew that Stark has so conducted himself as to be precluded from denying that he had failed to comply with those terms. In other words, he must have in some way represented to the company that he had failed to comply with the terms mentioned in the letter, and that, consequently, Akerman's authority to act for him had arisen. But there is absolutely no proof whatever of any conduct on the part of Stark which amounts to such a representation. The doctrine of estoppel, therefore, appears to me inapplicable to the facts with which we have now to deal. This view of the case renders it unnecessary to consider whether Akerman's knowledge that Stark had not been informed of the acceptance of his offer would have prevented the Consort Company from holding Stark estopped from denying Akerman's authority.

I stated in the early part of my judgment that Stark contended that he was induced to sign the underwriting letter by misrepresentation, and that the Consort Company could not hold him bound by the letter, even if it would otherwise have been binding upon him. This contention cannot, in my opinion, be supported. I agree with North J. on this point. The alleged misrepresentation was far too loose in its terms, and its untruth far too insufficiently proved, to afford Stark any right to relief against the Consort Company on this ground. Upon the ground, however, that the shares were allotted to him without authority, and that he is not estopped from insisting that they were so allotted, I am of opinion that the appeal ought to be allowed. Stark's name must be removed from the register, and the company must pay his costs here and below, except so far as they have been increased by his charge of misrepresentation. These costs he must bear himself; and he must further pay the company's costs occasioned by that charge, and there will be the usual set-off of costs.

A. L. SMITH L.J., after stating the facts and reading the underwriting letter, which, he said, he had no doubt was

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addressed to the Mines Company and not merely to its secretary, continued:—

The first question which arises is, whether the undertaking when signed by Stark on September 11, 1895, to subscribe or find responsible subscribers "for 10,000 shares of 1*l.* each, or such less number as may be accepted by you," became thereupon a binding contract upon Stark, or whether it was only an offer by him to subscribe when notice should have been given to him for how many shares his offer had in fact been accepted by the Mines Company, in which event he was bound to apply for the number for which they accepted. The construction of every underwriting letter must depend upon its individual terms: they differ exceedingly, and it appears to me clear upon the face of this underwriting letter that there was no binding agreement until Stark had notice how much of his proposal to the Mines Company had been accepted by them, and that, to create a contract binding him, this notice had to be given to him before September 21, 1895; for how was it possible for him to perform his part of the contract, unless he knew before September 21 for what number of shares the Mines Company had accepted his offer?

I have no doubt that North J. arrived at the right conclusion when he held that, upon the true construction of the letter of September 11, 1895, there was no contract binding Stark until notice of acceptance had been communicated to him, and that that notice was to be given before September 21, 1895.

It is, however, said on behalf of the Consort Company, that Stark is estopped from denying that he is bound by the underwriting letter—in other words, that he is estopped from denying that he had received the notice contemplated by the agreement.

Now what has Stark done, either by conduct or representation, to induce the Consort Company to alter their position so as to estop him from proving the truth? Reading the underwriting letter shortly, it comes to this: Stark writes to the Mines Company that he will underwrite shares in the Consort Company, then about to be brought out, up to 10,000, or any less number the Mines Company may agree to accept, provided

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the Mines Company before September 21, 1895, shall give him notice for how many of the 10,000 shares he is to subscribe, and that, if they do this and he should afterwards be in default, the Mines Company, as his agents, on his behalf and in his name, might then apply for the number of shares for which they had agreed to accept. What representation is there by Stark that he had received the contemplated and necessary notice of acceptance of his offer, or that, whether he had received the notice or not, the underwriting letter was an agreement binding him to take 10,000 shares, or any other number, in the Consort Company? I cannot find it, and I do not agree with the learned judge when he held that Stark was estopped from asserting as against the Consort Company that he was not in default in not subscribing for shares. I do not think that North J. would have come to this conclusion had he not felt himself bound by *Ex parte Harrison* (1), and thought that it governed the present case. But the ground upon which that case was really decided was very different. The dispute in that case was this. Harrison (who traded under the name of Pearson & Co.) had signed an underwriting letter, by which he had agreed with a Mr. Lakeman to subscribe, or to find responsible subscribers, for 300 ordinary shares of 10*l.* each in a brewery company about to be brought out, in consideration of a commission of 7½ per cent. being paid to him in cash upon the nominal amount of the 300 shares thereby underwritten by him, and had authorized Lakeman, in the event of his not applying for those shares, to apply for them in his name. It is true that at the foot of the agreement there was this clause: "This agreement is subject to your acceptance." On the same day Harrison wrote to a Mr. Newberry, Lakeman's agent, as follows: "Dear Sir,—Herewith we beg to inclose you contract for the underwriting of 300 ordinary shares in Henry Bentley & Co." (i.e., the brewery company), "on the distinct understanding that we receive an acceptance from you of the same before 11.30 A.M. to-morrow, otherwise our underwriting is not to hold good. Yours faithfully, Pearson & Co." This letter was not communicated either to Lakeman or to the brewery

(1) 69 L. T. (N.S.) 204.

company, nor was an acceptance given to Harrison before 11.30 the following morning. Harrison failed to apply for shares in the brewery company, and Lakeman subsequently applied in Harrison's name for 246 shares in that company, and he was placed upon the register of shareholders for that number of shares, which were accordingly allotted to him. Harrison contested the case before us upon the ground that he had not received an acceptance of his offer by 11.30 the next morning; and the effect of what I then called, and will again call, the "secret agreement" between Harrison and Newberry not being communicated to Lakeman or to the brewery company was the point discussed. We held, affirming the decision of Stirling J., who had decided the case upon the same ground, that, as Harrison had signed the underwriting letter for 300 shares unclogged with the condition contained in the secret agreement, with the intention that it should be acted upon by the brewery company in case he should not perform his part of the undertaking by subscribing when the time came for the 300 shares, he was estopped as against the brewery company from setting up the condition contained in the secret agreement. This, according to my recollection, was the ground upon which that case was decided. The point now taken—namely, that the offer contained in the underwriting letter had never been accepted so as to create a binding agreement—was not then argued or insisted upon before us, and, as appears from the judgment of Stirling J., was not taken before him. What Harrison insisted upon was, that he was not bound by the underwriting letter because he had received no acceptance by 11.30 the next morning. We held that, as he had not inserted this condition in the underwriting letter, which was the document he intended to be acted upon, but in a separate document, which was not communicated either to Lakeman or the brewery company, he was, as against the brewery company, estopped by his conduct from setting up the condition in the secret agreement.

An attempt was made to prove that Stark in fact knew before September 21, 1895, that his offer to underwrite 10,000 shares in the Consort Company had been accepted by the

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Mines Company; but I agree with North J. that this evidence wholly failed.

As to Stark's allegation that he was induced by misrepresentation to sign the underwriting letter, I agree that it entirely fails. But, upon the question of estoppel I disagree with North J., and I think that Stark is entitled to have his name removed from the register of shareholders of the Consort Company.

Rigby L.J. I am of the same opinion; but, as we are reversing the decision of North J., I wish, out of deference to him, to add a few words. As to the construction of the agreement, I agree with North J., and I shall refer to it only so far as is necessary in order to explain my view on the question of estoppel.

We are dealing with a case of a class which appears to be increasing in number, and in which I think it is not unfair to say that promoters of companies are doing their best to nullify those provisions of the Companies Act which forbid companies to issue shares at a discount. They, in effect, do this by providing for the payment of commissions, larger or smaller, to persons who will subscribe for shares. In the present case, we find instances of a commission of 15 per cent. being paid. The commission is indeed not paid by the company, but it is substantially the same thing as issuing the shares at a discount. Promoters are not philanthropic individuals who pay money out of their own pockets for nothing; they are speculators who will get from the company in another way quite as much as they pay in this way. They will, at any rate, do their best to effect that object. The case, therefore, is one of a class in which we ought not to shew any great favour to the persons concerned in it. Indeed, I think the Legislature might well deal with this class of agreements and make them either impossible, or, at any rate, much more difficult, to carry out than they appear to be now. We are dealing with promoters on the one hand, and with underwriters on the other. Such persons are not ignorant of the ways or the wiles of the market. We have here an agreement drawn by a promoter—astutely drawn—I

may say drawn for the purpose of enabling the parties to play fast and loose with their bargain. It would be easy, if promoters meant to act fairly, to say to a man, "If you will subscribe for a certain number of shares I will pay you a commission, and, in order that you may not evade your agreement, I insist upon your authorizing me now to apply for the shares in your name."

That is a simple case, and it is what the company endeavour to make out to be the meaning of this extraordinary contract.

In my opinion, no such meaning can fairly be extracted from it. It is plain that the promoters wished to put off to the last moment having to pay the commission on the shares. Nor can I disguise from myself that the underwriter was trying his best to avoid incurring any liability until he could satisfy himself that the risk which he ran (which is always, of course, represented as nominal) was in fact nominal. Here we have an agreement which is put forward by the promoter, and it is argued that the meaning of it is that the underwriter agreed to take 10,000 shares, or whatever less number should be stated in the form of acceptance signed by Akerman. It would be an extraordinary thing for a man to say, "I put the agreement out of my hand. I do not secure to myself a single sixpence of commission, because the blank in the form of acceptance may never be filled up. On the other hand, I allow the promoters (the Mines Acquisition Company) to retain in their hands" (so it was argued) "indefinitely the right of saying whether they will give me a sixpence of commission, or whether they will charge me as a subscriber for the whole number of 10,000 shares." Was that the meaning of the contract? I cannot see any ground for supposing that it was. It would not be an honest meaning, and I do not think it would be reasonable to attach such a meaning to it.

Very likely the promoters tried to give such a colour to it, but they dared not say it in plain language, and in my judgment they have not said it at all. What they did say (and the whole stress of the argument has been founded upon it) was this: "The number of shares for which you accept the

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contract as below." How was it endeavoured to expand that in argument? "The number of shares for which you choose, when and as you please, to fill up the blank in the memorandum below." Is that necessary? In the first place, the words "as below" are completely satisfied by that which follows immediately in the text. "For 10,000 shares of 1*l.* each, or such less number as may be accepted by you." That fully satisfies the words, and if they were inserted for that other and (as I consider it) illegitimate purpose, the person who inserted them has failed in his object. But, even if those words were not there, what would the offer mean? Would it mean, "The number of shares for which you may, whenever you please, choose to fill up the blank, without telling me anything about it"? I think not. "The above contract is accepted by me to the extent of" [blank] "shares underwritten." In my opinion "accepted as below" does not mean by merely entering a number in the blank, but accepted as in ordinary cases, that is, accepted and communicated in due time to the person who makes the offer. There are, no doubt, cases in which an offer may be converted into a contract without express notice to the person who makes the offer. You may, for instance, make a conditional proposal, and, if the person to whom it is addressed (whether by name or as a member of the public by advertisement) performs the condition, then the offer becomes operative as a contract, and there may perhaps be some other cases in which a contract binding two persons may be constituted by the acceptance by the one of an offer made by the other without notice of the acceptance. I have come without any doubt to the conclusion that there is no such contract in the present case.

I pass now to the important question of estoppel. The underwriting letter was brought by Akerman to the Consort Company after their formation, and was shewn to their directors. I pass over the fact that Akerman was the secretary of both companies, and that he knew all about the matter from beginning to end. I assume that he approached the Consort Company as a stranger, and that the directors and other officials of

that company were all ignorant of everything, except what they learned from this document. What did they learn from it? They learned that it was an offer made by Stark on September 11, 1895, and that there purported to be an acceptance by Akerman on September 12. We now know that was not the fact. But what right had the directors, or any man of business, to suppose that that apparent acceptance had been converted into a real acceptance by communication to Stark? Absolutely none. If people will only close their eyes sufficiently to the facts before them they can believe anything; but they are not justified in law in so doing. I have no doubt the directors were told by Akerman (if not in express words it was implied) that the offer had been duly accepted; but they had no ground for assuming that there had been that which the law would consider an acceptance. And the matter does not rest there, because there is also this important clause: "In the event of my failing to comply with the terms herein stated I authorize you." This authorization is merely conditional. What right had the Consort Company to suppose that this authority, which was in terms conditional, had become absolute by reason of the performance of the condition? Absolutely none. Stark could not be said to have "failed" to comply, until he had had the opportunity of complying. As a matter of fact he had had no such opportunity, and it appears to me perfectly idle to talk of an estoppel. The Consort Company ought to have asked, "When did Stark pay? How did he pay?" As I have already pointed out, if promoters intend to have a fixed contract by an underwriter to take a definite number of shares, and an absolute authority to apply for them on his behalf, they should state their meaning in plain and honest language. But, if they did this, probably no one would bargain with them. It is the fear that they will not be able to induce people to bargain with them on those terms that leads them to enter into what I must call uncandid and dishonest contracts. In my view the man who drew this letter intended to have a catching contract, to which he might or might not give effect as it should suit his interest. In my opinion there is no ground for applying the doctrine of estoppel. I will say

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nothing about *Ex parte Harrison* (1) except that I concur in what the Court then said. But, for the reasons stated by my brother Lindley L.J., I think that case can in no way govern the present case. As regards the other point of constructive notice, it is not necessary for us to decide it now, though I do not think there would be much difficulty in deciding it, if it were necessary to do so.

Solicitors: *W. J. Payne; Mellor, Smith & May.*

W. L. C.

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[1896 B. 3114.]

Vendor and Purchaser—Building Estate—Owner of two Tenements—Purchase of one Tenement—Conveyance—General Words—Light—Implied Grant—Derogating from Grant—"Building Land"—"Contrary Intention"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4.

In 1896 the defendant, the owner of building land, sold and conveyed part of it, as "beneficial owner," without any express general words, to the plaintiff. The conveyance included a house on the land conveyed which had been built by the defendant with windows overlooking the land retained by him and referred to in the conveyance and the plan thereon as "building land," but the conveyance contained no express reservation to the defendant of any right to build on that land. The defendant subsequently built on that land a house so close to the plaintiff's as to interfere with the access of light to his windows:—

Held, that by s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, the conveyance included all lights enjoyed with the house, and that the reference in the conveyance and plan to the adjoining land as "building land" was insufficient to shew a "contrary intention" within sub-s. 4: and that, on the principle that a grantor cannot derogate from his own grant, the plaintiff had primâ facie an unrestricted right to light as against the defendant, and the burden of setting limits to that right lay on the defendant. And on proof by the defendant that this primâ facie right was restricted by the plaintiff's own admission that he would have been satisfied if the defendant's house had been set back to a certain distance, an inquiry was directed what damages the plaintiff had

(1) 69 L. T. (N.S.) 204.

sustained by reason of the obstruction of light to his windows occasioned by the defendant's house not being so set back.

Swansborough v. *Coventry*, (1832) 2 Moo. & Sc. 362; 9 Bing. 305, approved of.

Birmingham, Dudley and District Banking Co. v. *Ross*, (1888) 38 Ch. D. 295, and *Myers* v. *Catterson*, (1889) 43 Ch. D. 470, discussed and explained.

By an indenture of September 10, 1895, a piece of ground, being part of a building estate in Mostyn Avenue, Llandudno, then in course of development, was sold and conveyed to Williams and Jones, builders, as tenants in common in fee simple, subject to certain covenants by the purchasers as to the class of houses to be erected thereon, and as to the mode of user thereof. Williams and Jones then divided their piece of ground into two rectangular plots and proceeded to build thereon a pair of semi-detached villas, one on each plot, which were subsequently known respectively as "Montrose," being on the east, and "Rothesay" on the west, a space being left between the side or gable end of each villa and the boundary wall on that side so as to form a passage to the rear of each house. The passage belonging to "Rothesay" was on the west side of the house, the width between the house and the western boundary wall of the plot on which the house stood being 4 feet 9 in. Adjoining this wall was a piece of vacant land, and the west side of the house contained a kitchen window and other windows facing this land.

In February, 1896, one Broomfield commenced negotiations with Williams and Jones for the purchase of "Rothesay," and by an indenture dated March 25, 1896, Williams and Jones, as beneficial owners, sold and conveyed that property to Broomfield in fee simple—the property being described on a plan on the conveyance shewing a "building line" for the frontage towards Mostyn Avenue—together with rights of way over adjacent roads, "except nevertheless and reserving to the vendors their heirs and assigns and other the owners and occupiers for the time being of the land shewn on the said plan contiguous or near to the piece of land hereby conveyed marked 'building land' a right of way": this "building land" shewn on the plan being the piece of vacant land above mentioned. And

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the purchaser covenanted to observe the covenants in the conveyance of September 10, 1895. At the date of the conveyance of "Rothesay" Williams had entered into a contract for the purchase on his own account of the vacant land adjoining the west side, and described on the plan as "building land," but the conveyance to Broomfield contained no reservation in terms to the vendors or either of them of the right to erect buildings on that land. This vacant land was eventually conveyed to Williams by an indenture dated June 4, 1896, and on June 11 he commenced building on it a pair of semi-detached villas with the east wall or gable end close up to the boundary wall between it and "Rothesay," thus threatening to obstruct the west windows of that house. Thereupon Broomfield, on July 14, 1896, served Williams with a notice stating that if the houses were built up close to the boundary wall they would materially obstruct the west windows of "Rothesay," and so cause him irreparable injury: and threatening Williams with legal proceedings if he proceeded with the houses in such a manner as to obstruct or interfere with his, Broomfield's, windows.

In spite of the notice, however, Williams proceeded with the building of his houses, and accordingly Broomfield, on July 21, 1896, issued the writ in this action against Williams, claiming a declaration that under and by virtue of the conveyance of March 25, 1896, the plaintiff was entitled to such access of light to the windows of "Rothesay" over the defendant's land on the west side thereof as in fact came to the windows at the date of the conveyance. The defendant's houses had since been completed. The plaintiff's contention was that as the defendant was one of the vendors to him of "Rothesay," and was also at the same time the owner of the vacant land adjoining, he, the plaintiff, was, by virtue of the conveyance to him, entitled to an implied grant of light to his west windows, and that the defendant, in obstructing the access of light to those windows, was derogating from his own grant.

The action came on for trial with witnesses before Kekewich J. on December 8, 1896, without pleadings, but upon four issues, of which the following only were really argued:—

(3.) That at the date of the conveyance to the plaintiff, the

said adjoining land was, and was marked on the plaintiff's conveyance as, building land with a building line, and that, generally, the facts as to the buildings in Mostyn Avenue and the immediate neighbourhood, and the circumstances, negatived any grant to the plaintiff of the right to light to "Rothesay" over the said adjoining land on the west, and disentitled the plaintiff to complain of the defendant's new buildings.

(4.) That the erection of the defendant's new buildings would not in fact materially obstruct or darken the windows at the side of the plaintiff's house, or materially interfere with the access of air to such windows.

From the evidence at the trial it appeared that Mostyn Avenue consisted of a row of semi-detached villas of a similar character to "Rothesay," either built or building at the time the plaintiff was negotiating with the defendant for the purchase of "Rothesay," and that the side spaces or passages in several instances varied in width; and the plaintiff deposed that during the negotiations the defendant informed him in conversation of his, the defendant's, intention to purchase and build similar semi-detached villas upon the land adjoining "Rothesay," but said nothing about building close up to the boundary wall; that, on the contrary, he, the plaintiff, understood from the conversation that the defendant would leave a passage on his side of the wall corresponding to that on the plaintiff's side, and of the same width, namely, 4 ft. 9 in.

In the result his Lordship dismissed the action with costs, being of opinion that, although there had been, upon the evidence, a serious and material interference with the access of light to the plaintiff's west windows, he nevertheless had no cause of action against the defendant.

The plaintiff appealed.

The appeal was heard on February 23 and 25, 1897.

Warrington, Q.C., and *Badcock*, for the plaintiff. It is clear upon the evidence that there has been a material interference with the access of light to the plaintiff's windows. The substantial point is whether the surrounding circumstances negative the presumption that the defendant granted to the plaintiff

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a right to the access of light to his windows over the defendant's adjoining vacant land. Sect. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41)—which enacts that a conveyance of land with the houses on it includes lights at the time of the conveyance enjoyed with the houses—should be read into the conveyance as part of the grant. The onus, then, is upon the defendant to shew that there is any limitation upon the primâ facie right of the plaintiff to that access. Kekewich J. was wrong in thinking that the onus was on the plaintiff to shew that his right is not limited. There is in the conveyance to the plaintiff no reservation to the defendant of a right to obstruct the plaintiff's light. The mere reference in the plan to the vacant land as "building land" is not sufficient to negative the plaintiff's primâ facie right. "Building land" does not mean that the land is to be completely covered with houses. That description is quite consistent with the erection of houses on the land in such a manner as not to obstruct the plaintiff's light. The evidence shews that the plaintiff was justified in inferring that the houses to be erected on the vacant land would be of a similar character to those which had already been built in the same row, and that there would be between his boundary wall and the nearest house to the west of it a passage as wide as that between the boundary wall and his own house. In that case there would have been no substantial obstruction of his light, and if that passage had been left he would not have complained. By his conveyance, which contained no building reservation to the defendant, the plaintiff acquired a legal right to the light which came to his windows across the vacant land, and the defendant would have had no defence to an action at law for damages for the obstruction: *Swansborough* v. *Coventry* (1); *Myers* v. *Catterson.* (2) In *Birmingham, Dudley, and District Banking Co.* v. *Ross* (3) there was enough to rebut the presumption in favour of the grantee.

[LINDLEY L.J. I am inclined to think that here the limit is 4 ft. 9 in.; that the defendant is not entitled to build within 4 ft. 9 in. to the west of the plaintiff's boundary wall; and that

(1) 9 Bing. 305. (2) 43 Ch. D. 470.
(3) 38 Ch. D. 295.

the plaintiff is entitled to an inquiry as to damages by reason of the defendant's having done so.]

Bramwell Davis, *Q.C.*, and *Rowden*, for the defendant. There should be no limitation upon the defendant's right to build. The onus of proving a limitation is on the plaintiff, not on the defendant. Regard must be had to all the circumstances of the case. The plaintiff knew that the vacant land was building land, and that the defendant intended building upon it, and he bought his house subject to the risk of the defendant's building upon that land. The grant to the plaintiff was not a free one. *Swansborough* v. *Coventry* (1) is inconsistent with the more recent authorities such as *Birmingham, Dudley and District Banking Co.* v. *Ross* (2) and *Myers* v. *Catterson.* (3)

[LINDLEY L.J. referred to *Allen* v. *Taylor.* (4)]

In *Swansborough* v. *Coventry* (1) there were ancient lights, as pointed out by Bacon V.-C., in *Wheeldon* v. *Burrows.* (5) The circumstance that the vacant land was not only known to the plaintiff as "building land" but also described as such in the conveyance and on the plan takes the case out of the general rule that a grantor who wishes to retain to himself any right of derogating from his grant must reserve it in express terms: *Rigby* v. *Bennett.* (6) The operation of s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, is excluded, for a "contrary intention" is shewn by this conveyance within sub-s. 4: *Beddington* v. *Atlee.* (7) The law applicable to the present case is laid down in *Birmingham, Dudley and District Banking Co.* v. *Ross* (2), where it was held that there was no limitation, as there was in *Swansborough* v. *Coventry* (1), to the right of building on the adjoining land. The question with regard to the right to light is not so much what the grantor has reserved to himself as what is the intention of the parties. (8) And not only the intention, but all the circumstances of the case must be looked at; and that being so, we submit that the plaintiff has had under his conveyance all he

(1) 9 Bing. 305.
(2) 38 Ch. D. 295.
(3) 43 Ch. D. 470.
(4) (1880) 16 Ch. D. 355.
(5) (1879) 12 Ch. D. 31, 45.
(6) (1882) 21 Ch. D. 559, 567.
(7) (1887) 35 Ch. D. 317.
(8) 38 Ch. D. 313.

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could reasonably have expected. With regard to the argument that the plaintiff has an undisputed claim to damages, it should be noticed that at the date of the conveyance the defendant had nothing more than an equitable title to the vacant land, and certainly under the old law the plaintiff in an action at law for damages would have been non-suited.

Warrington, Q.C., in reply.

Cur. adv vult.

March 12. LINDLEY L.J. This is an appeal by the plaintiff against the dismissal of his action with costs.

The plaintiff bought a house with windows in it from the defendant, who was the owner of an adjoining piece of land on which he intended to build, as the plaintiff knew. The conveyance to the plaintiff contained a plan shewing the land granted, and also a piece of land adjoining marked "building land," but the conveyance contained no reservation of any right to enable the grantor so to build on the adjoining land as to darken the windows in the house which he sold and conveyed to the plaintiff. [His Lordship then referred to the conveyance and to the plan, and continued:—]

The reference to the plan and the description in it of the adjoining land as "building land" does not shew any intention to exclude the operation of s. 6 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), for it was quite possible to build on that adjoining land without darkening the windows of the house conveyed. Consequently the conveyance of the house must be read as if the words in s. 6, sub-s. 2, of that Act were contained in the conveyance—i.e., as if the conveyance contained the words "together with all lights appertaining to or occupied or enjoyed with or reputed as part of" the house, and as if such lights were conveyed with it. I do not myself lay much stress on these words: they probably add little, if anything, to the conveyance of the house as it was at the date of the conveyance. But from one point of view they may be important, as will appear presently.

Having regard to the conveyance and to the foregoing circumstances, I was surprised to find that there could be any

doubt as to the right of the plaintiff to enjoy the lights conveyed to him unobstructed by his grantor. It was quite new to me to have to consider in such a case what was reasonable or not. But so much was made of *Birmingham, Dudley and District Banking Co.* v. *Ross* (1) and *Myers* v. *Catterson* (2) that I desired to look again at those cases in order not to make any mistake. Those cases throw no doubt at all upon the principle that a grantor cannot derogate from his own grant. But they shew the importance of ascertaining accurately what has been granted in any particular case to which the principle has to be applied. In those cases the grantor had not sold or conveyed a house built by himself with windows for the admission of light. The house had been built by the grantee on vacant land which he had agreed to buy, and the conveyance came afterwards, when the vendor had no equitable interest in the property conveyed. The question then arose what lights the purchaser was entitled to. In the *Birmingham* case (1) the circumstances shewed that the purchaser had bargained for, and had obtained special protection against obstruction, and was entitled to no more. In *Myers* v. *Catterson* (2) it was held that the purchaser was entitled to all the light which his vendors could give him, but that they, being a railway company, could not fetter themselves by granting rights to light which would prevent them from exercising their statutory powers and performing their statutory duties.

It was contended that these cases had shaken the law previously established by *Swansborough* v. *Coventry* (3) and older authorities. But I do not so understand them. On the contrary, Cotton L.J. (4) distinctly recognises the principle on which they were decided. They were also recognised as law in *Wheeldon* v. *Burrows* (5) and *Allen* v. *Taylor*. (6) Some passages were read from the judgment of Bowen L.J. in the *Birmingham* case (1), which, if taken by themselves and apart from the facts of the case before him, would favour the

(1) 38 Ch. D. 295.
(2) 43 Ch. D. 470.
(3) 9 Bing. 305.
(4) 38 Ch. D. 310; 43 Ch. D. 477.
(5) 12 Ch. D. 31.
(6) 16 Ch. D. 355.

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defendant's view; but he certainly never intended to throw any doubt on the above authorities.

If this were a case of an implied grant, and not, as I think it is, a case of express grant, the defendant would still be in the wrong. The grantor cannot throw on the grantee the onus of shewing the limit to be set on rights incidental to the enjoyment of the property granted. If such rights are to be limited in favour of the grantor, it is for the grantor, and not for the grantee, to shew what those limits are. Even if s. 6, sub-s. 2, of the Conveyancing Act, does not apply by reason of the words "building land" on the plan, I should still hold, on the authority of *Swansborough* v. *Coventry* (1) and the older decisions, that the grantee had a primâ facie unrestricted right to light as against the grantor, and that the burden of setting limits to such right lay on the grantor. As the plaintiff does not complain of the defendant's building except so far as it injures him by being nearer than 4 ft. 9 in. to the boundary wall, the defendant will have the benefit of this limitation of his claim. In my view it is a concession; but in the other view the plaintiff's own evidence may be regarded as fixing the extent to which the defendant has succeeded in limiting the right of the plaintiff to the light of his west windows.

In any event, the defendant has exceeded his rights, and the following will be the proper wording of the judgment. Allow the appeal and discharge the order. Declare that the defendant was not entitled so to build on his land adjoining the plaintiff's house as to create any material obstruction to the light which came to the kitchen and other windows on the west side of the plaintiff's house at the time of the grant thereof by the defendant to the plaintiff. And the plaintiff not claiming any damages by reason of any obstruction to such windows which would have been caused by the defendant's house if it had been set back 4 ft. 9 in. from the wall bounding the plaintiff's land on the west side thereof, inquire what damages the plaintiff has sustained by reason of the obstruction of light to the said windows occasioned by the defendant's house not being so

(1) 9 Bing. 305.

set back, and order the defendant to pay such damages when ascertained. Liberty to apply. Defendant to pay the costs of the action and of the appeal.

A. L. SMITH L.J. (after stating the facts):—The plaintiff bases his action upon the well-known maxim that a grantor shall not derogate from his own grant; and he asserts that the defendant has done so by building the two houses as he has in the present case. I do not found my judgment upon there being an express grant of light by the grantor to the grantee. Be this as it may, there certainly was an implied grant in this case. It is clearly established that at the time of the conveyance, when the plaintiff purchased the land and house with its existing windows from the defendant, he, the plaintiff, knew the defendant was about to build, upon his vacant land to the west of the plaintiff's house, houses similar to those already built in the row. Indeed the plaintiff admitted in the box that the defendant had told him that he intended building thereon one pair of houses similar to those already built. The plaintiff did not know the spot upon the vacant land upon which the defendant was about to build, but that he knew the defendant was going to build two houses thereon is beyond dispute.

In these circumstances two rights, it will be seen, come into conflict: the one, the right which the grantee, the plaintiff, has of not having the grant to him derogated from by the grantor; the other, the right which the grantor has of building upon his own land. In these circumstances the question arises as to what is the obligation on the part of a grantor to a grantee under such circumstances as the present. I have no doubt of this, that a grantor in such circumstances cannot build upon his own land in such a way as to block out altogether the light passing over his own land to the windows of his grantee, for this would frustrate the very object of the grant—namely, that the grantee should be able to use his house as a house. Lord Holt, in *Tenant* v. *Goldwin* (1), says this: "If indeed the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the

(1) (3 Anne) 2 Ld. Raym. 1089, 1093.

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ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee . . . . Where he sells the house, the vacant piece of ground is by that grant charged with the lights." Bowen L.J., in *Myers* v. *Catterson* (1), puts it thus: "Surely it must be in the contemplation of the parties that, in the absence of any express agreement one way or the other, the vendor shall not so use that land which he retains as to preclude any possible use of the building or land which he sells, or to prevent that use of it for which he knows he is selling it to the purchaser." That there is this limitation or restriction placed upon the right of the grantor as to building, I do not doubt.

The question then arises, Is there any other limitation or restriction; and, if so, what is it, and where is the line to be drawn? Primâ facie a grantee in circumstances such as exist in the present case has the right to have the light coming to his windows over the lands of the grantor unobstructed by the grantor. This was laid down in 1832 by Tindal C.J. in delivering the judgment of the Common Pleas in *Swansborough* v. *Coventry*. (2) He said: "It is well established by the decided cases, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights." *Palmer* v. *Fletcher* (3) and other cases are cited in support of this proposition. I am not aware that this statement of the law as to the obligation of a vendor to his vendee has ever been doubted; and on the contrary I find that the Court of Appeal in 1879, in *Wheeldon* v. *Burrows* (4), cites with approval this statement of the law by the Common Pleas, and again in *Allen* v. *Taylor* (5), in 1880, Sir George Jessel M.R. casts no doubt upon this proposition relating to the obligation of a grantor to his grantee.

(1) 43 Ch. D. 481.
(2) 9 Bing. 309.
(3) (15 Car. 2) 1 Lev. 122.
(4) 12 Ch. D. 31, 51–2.
(5) 16 Ch. D. 355.

There being this primâ facie right of a grantee, in circumstances such as exist in the present case, not to have his lights interrupted by his grantor, how, when the grantee brings an action against the grantor for derogating from this right, can the grantor shew that what he is doing does not give a cause of action to his grantee, when a material interruption to his lights is established? In my opinion it can only be by the grantor shewing that the primâ facie right of the grantee is in some way limited and restricted. The burden of proof is upon the grantor; and if he does not shew that this primâ facie right which the grantee has is in some way cut down, and if a material diminution of the grantee's light by what the grantor has done upon his own land is established by the grantee, he is entitled to judgment.

When the cases of *Birmingham, Dudley and District Banking Co.* v. *Ross* (1) and of *Myers* v. *Catterson* (2) are examined, it appears that the above statement of the law is not impugned, and that each of these cases was decided upon the ground that the grantor was able to shew that this primâ facie right of the grantee was limited or restricted; or, in other words, the grantor was able to shew what was the implied obligation which he, in fact, undertook when he sold to the grantee.

In the one case, *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), it was shewn that it was perfectly well known to each party when the sale took place that the land was to be built upon by the corporation, i.e., the grantors, as they liked, subject only to this, that there was to be a passage of the width of twenty feet between the buildings of the grantors and the house of the grantee, and that this was the measure of the grantee's protection.

In the other case, *Myers* v. *Catterson* (2), the grantors (the railway company) established that the grantee knew, at the date of the conveyance to him of his house, that the grantors required the remainder of the land for the purposes of the construction of their railway; and it was held that the obligation which the grantors (the railway company) undertook towards the grantee was limited by this—that the company

(1) 38 Ch. D. 295. (2) 43 Ch. D. 470.

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might utilize their land for that purpose, but for no other, and that this was the measure of the grantee's protection.

This is what I understand Cotton L.J. was pointing to when, in *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), he said: "But when the question is as to an implied obligation we must have regard to all the circumstances which existed at the time when the conveyance was executed which brought the parties into that relation from which the implied obligation results."

In the present case, how does the defendant, the grantor, displace the primâ facie case of the plaintiff, the grantee? If the defendant could have shewn nothing whereby to cut down the primâ facie right of the grantee not to have his light interfered with by the grantor, I should have thought, as before stated, that the defendant could not have materially obstructed the plaintiff's light; but the defendant has been able, out of the plaintiff's own mouth, to establish this, that at the date of the conveyance to him he knew right well that the defendant was about to build upon his own land, and that all he required was that when the defendant erected his proposed buildings the passage of 4 ft. 9 in. should be left unbuilt upon by the defendant between his buildings and the plaintiff's house.

In these circumstances the defendant, by the plaintiff's own admission, has established that his right to build upon his vacant plot was only limited to this, that the defendant was not to build any house substantially higher than those already erected in the row, that he was not to build over that part which was to constitute the passage, and that this was the only obligation which he undertook to the grantee when he executed the conveyance to him. The defendant has shewn that the plaintiff's primâ facie right is not an unrestricted right to the passage of light over the whole of the defendant's land, and that the defendant's right to build his proposed houses upon his own land was only restricted as above mentioned. This restriction the defendant has not observed, and consequently he is liable in this action, and in the circumstances of this case

(1) 38 Ch. D. 308-9.

the declaration proposed by my brother Lindley is the proper declaration to make.

RIGBY L.J. The cases cited in argument before us were cases in which, looking to the conveyance alone, you find no grant of the easement interference with which is complained of. The protection of the easement must therefore in each of these cases depend upon the doctrine of implied grant. The only case which I think it necessary to examine in reference to the point is *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), which is hereafter dealt with. The present case belongs, in my judgment, to the totally different class of grants by construction (not by implication), where the express words of the conveyance, when properly construed (regard, of course, being had to the state of circumstances existing at the date of the conveyance), convert a quasi-easement into a new legal easement. *Kay* v. *Oxley* (2) and *Bayley* v. *Great Western Ry. Co.* (3) may be taken as leading instances of this class, but the decisions with reference to it are numerous, and the principle now well settled. In *Bayley* v. *Great Western Ry. Co.* (3) will be found a clear exposition by Bowen L.J. of the difference between the two classes. He is speaking of a right of way, but of course his language would apply with at least as much force to a right of light.

The words contained in the conveyance in *Kay* v. *Oxley* (2), and other cases of the kind, are not indeed to be found in the actual deed of conveyance in this case, but words at least as extensive are introduced by s. 6, sub-s. 2, of the Conveyancing Act, 1881. It is true that the section applies, if only and so far as a "contrary intention" is not expressed in the conveyance: see sub-s. 4. Here, however, the only words that can be suggested as expressing a contrary intention are the words "building land" occurring in the reservation of a right of way, and on the map attached to the conveyance. Bearing in mind the principle that a grant must be construed, in case of ambiguity, against the grantor, and the well-established deduction

(1) 38 Ch. D. 295. (2) (1875) L. R. 10 Q. B. 360.
(3) (1884) 26 Ch. D. 434.

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from that principle that a reservation in the grantor's favour, not being a reservation of an easement of necessity, must be expressed in clear and unambiguous language in order to be valid, it does not, in my judgment, need authority to prove that these words, which may be satisfied without interference with the rights as to light enjoyed at the time of the conveyance, are not inconsistent with the continuance of them. But the considered judgment of the Court of Common Pleas, delivered by Tindal C.J. in *Swansborough* v. *Coventry* (of which the best report is to be found in 2 Moore & Scott, 362), shewing these words to be insufficient of themselves to rebut the presumption of an implied grant, is a fortiori an authority for holding them insufficient to exclude the operation of the Conveyancing Act in bringing about an express grant.

I have said that the case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (1) needs some examination. There, as in *Myers* v. *Catterson* (2) and in *Rigby* v. *Bennett* (3), the house in respect of which an easement was claimed was erected, not by the grantor, but by the grantee. The grantor, the Corporation of Birmingham, sold, not a house, but the site only of a house. It was at the time, not of the conveyance, but of the contract for the purchase of the site, that the rights to be enjoyed with the house when built were determined. The decision of the Court of Appeal was that at that time it was agreed in substance that the corporation were to have the unrestricted right of building on the further side of Warwick Passage which the grantee stipulated should be twenty feet wide. Cotton L.J. dealt with the question of an express grant by virtue of the Conveyancing Act, having regard to this state of things. His decision was—and it is difficult to see how it could have been otherwise—that, having regard to the pre-existing agreement, no easement over the corporation land on the further side of the passage was ever enjoyed de facto by the owners of the house. From this it followed that s. 6, sub-s. 2, of the Conveyancing Act, even supposing it to be read at length into the conveyance, had no application.

No part of the judgment of Bowen L.J., except that which

(1) 38 Ch. D. 295. (2) 43 Ch. D. 470. (3) 21 Ch. D. 559.

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excludes the hypothesis of an express grant, has any application to the case of an express grant.

It follows, in my judgment, that the numerous cases, of which *Kay* v. *Oxley* (1) is a leading instance, in which the quasi-easement has been treated as enjoyed with what becomes on severance the dominant tenement, govern the present case.

I should have had great difficulty, to say the least, in coming to the conclusion that there was anything to entitle the vendor to the plaintiff to interfere more with the plaintiff's lights than if he had been a stranger and the lights ancient lights. However, the very fair and equitable treatment of the case by the plaintiff relieves the Court from any difficulty in the matter. There can, in my judgment, be no question that he is entitled to the only relief which he has asked for, and the appeal should be allowed.

Solicitors: *Crowders & Vizard, for W. E. Watson, Manchester; Minshall & Co., for Pugh & Bone, Llandudno.*

G. I. F. C.

In re WESTERN COUNTIES STEAM BAKERIES AND MILLING COMPANY.

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STIRLING J. *Jan.* 12, 27.

C. A. *Feb.* 24; *March* 11.

Company—Winding-up—Auditor—Officer—Misfeasance—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

An auditor may or may not be an "officer" of a company, and primâ facie he is not; but if he is appointed to the office of auditor to the company, and acts in that office, he will be an "officer" within s. 10 of the Companies (Winding-up) Act, 1890; and in case the company is wound up he will be liable to a misfeasance summons under that section in respect of dividends declared upon the faith of his audit; and no irregularity in his appointment would avail him as a defence. But, seeing that the word "auditor" does not occur in s. 10, the performance of auditor's work upon a given occasion by a person who has never been appointed to the office of auditor of the company, does not make that person an "officer" of the company so as to render him liable under the section.

The decision of Stirling J. reversed.

THE above-named company was formed in January, 1888, under articles of association which, as regards the appointment,

(1) L. R. 10 Q. B. 360.

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remuneration, and duties of auditors, were substantially in the same form as the clauses in that behalf in Sched. I., Table A, to the Companies Act, 1862—i.e., they provided (clause 125) that once a year the accounts of the company should be examined, and the correctness of the balance-sheet ascertained by two auditors; (clause 126) that the first auditors should be appointed by the directors, and that subsequent auditors should be appointed by the company in general meeting, and the re-election should be made by the company at their ordinary meeting in each year; (clause 128) that the remuneration of the first auditors should be fixed by the directors, and that of subsequent auditors by the company in general meeting; (clause 129) that any auditor should be re-eligible on his quitting office. Clauses 131–133 also contained provisions as to the duties of the auditors similar to those in clauses 92, 93, and 94 of Table A, but omitting the direction contained in clause 94 as to the reading of the reports therein mentioned at the ordinary meeting.

The company carried on its business at Bath and Bristol.

Messrs. Charles Edward Parsons and Frederick Pring Robjent carried on business in partnership as accountants and stock and share brokers at Newport in Monmouthshire, and their connection with the company arose through some negotiations which took place in November, 1888, with reference to an advance on mortgage or debenture which the company were desirous of obtaining, but which led to no result.

On January 23, 1889, Mr. Day, the chairman of the directors of the company, wrote to Mr. Parsons the following letter:—

"Steam Bakeries.

"I am sorry to learn that your exertions in this matter have ended so unprofitably, as I feel this has resulted through no fault of your own. I should be glad if it were possible to see some further business put in your way. We are now preparing our balance-sheet, and there are some items in it which will require, I think, the services of a valuer such as yourself. You have already looked over our business establishments pretty carefully, I think, and a day or two in Bath further would enable you to make a report upon the matter. I presume this

business would be in your line, and as Newport is now such a short distance from Bath I dare say you will think it worth your while to run over and see me on the matter, when I make no doubt we could readily adjust the question of terms, &c., and when I could more fully explain what it is the board want done."

In consequence of this letter Mr. Parsons went to Bath and saw the chairman, and subsequently sent a clerk to the offices of the company, who prepared a balance-sheet of the property and liabilities of the company for the year ending December 31, 1888. This was sent by the firm to Mr. Day, the chairman, with the following certificate annexed:—

"We have carefully examined the accounts of the Western Counties Steam Bakeries and Milling Company, Limited, and find the same to be in accord with the above balance-sheet, which shews the correct financial position of the company.

"Parsons & Robjent.

"Newport, Monmouth,

"February 13th, 1889."

This balance-sheet with the certificate annexed was subsequently circulated among the shareholders of the company, and a dividend on the basis of it was declared at a general meeting held in February, 1889.

Messrs. Parsons & Robjent had some difficulty in obtaining payment of the fee charged by them for preparing this balance-sheet; but after considerable correspondence, and after they had commenced proceedings to recover it, their fee was paid them on September 10, 1889, by the cheque of Mr. Day.

About the end of the year 1889, or the beginning of 1890, a Mr. Lucy, who was one of the directors of the company, requested Messrs. Parsons & Robjent to go over the accounts of the company, explaining to them that they would not have to prepare a balance-sheet, but merely to audit the accounts. The same clerk again visited Bath, examined the accounts, and on behalf of the firm signed a certificate dated January 30, 1890, which was appended to the balance-sheet for the year ending December 31, 1889, and was in the same terms as the previous certificate.

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According to the view taken by Stirling J. of the evidence, Messrs. Parsons & Robjent knew that that balance-sheet and certificate would be submitted to the shareholders of the company.

Messrs. Parsons & Robjent received in respect of the work done by them on this occasion a fee of 12*l.* 12*s.*, which was paid to them by the cheque of the company on March 6, 1890. The balance-sheet and certificate lastly above mentioned were circulated amongst the members of the company, and a dividend on the basis thereof was declared at a general meeting of the company on February 13, 1890.

The company having gone into liquidation, a misfeasance summons was taken out by the deputy official receiver, who was also the liquidator, under s. 10 of the Companies (Winding-up) Act, 1890, against Messrs. Parsons & Robjent, as "officers" of the company, in respect of the dividend declared at the last-mentioned general meeting.

Messrs. Parsons & Robjent then took out a summons asking for security for the costs of the above-mentioned summons; but on the liquidator admitting his personal liability to pay costs in case he should be ordered to do so by the Court, no order was made on the summons, following the decision of Romer J. in *In re Powell & Sons.* (1)

Messrs. Parsons & Robjent then took out the present summons, asking that the proceedings under the misfeasance summons might be stayed as against them upon the ground that they were not officers of the company within the meaning of s. 10 of the Companies (Winding-up) Act, 1890; and this summons was adjourned into Court, and came on for hearing before Stirling J. on January 12, 1897.

There was no evidence that Messrs. Parsons & Robjent had ever been formally appointed auditors of the company, or that their remuneration had ever been fixed in accordance with its articles of association, and the case was dealt with on the footing that they had not been so appointed.

Hastings, Q.C., and *Frank Evans*, in support of the summons

(1) [1896] 1 Ch. 681.

to stay proceedings. The applicants are not "officers of the company" within the meaning of s. 10 of the Companies (Winding-up) Act, 1890.

Auditors who have been duly appointed by a company are, no doubt, "officers of the company": *In re London and General Bank* (1) and *In re Kingston Cotton Mill Co.* (2); but these gentlemen were only employed as casual auditors for a special purpose. The case comes within the observations of Kay L.J. in *In re London and General Bank* (3), where he said: "I wish to guard myself against being understood to hold that in every case of a joint stock company the auditor employed by the joint stock company is an officer of the company. I do not at present hold that opinion. I can quite conceive that there may be cases of a joint stock company who call in an auditor to make a particular audit where the auditor called in could not be properly treated as an officer of the company." This is just that case.

The decision in *In re London and General Bank* (1) ought not to be extended to a case where there has been no formal appointment of an auditor. If these gentlemen have been guilty of any misfeasance, the proper course is to bring an action against them, as was done in *Leeds Estate Building and Investment Co.* v. *Shepherd.* (4) As casual auditors they are not subject to the summary jurisdiction under s. 10.

Edwin Ward, for the deputy official receiver and liquidator. Where a person assumes the duties and accepts the remuneration of an office he must be taken to have accepted also its responsibilities: *Coventry and Dixon's Case* (5); *Gibson* v. *Barton.* (6) Auditors de facto are equally subject to the jurisdiction with auditors de jure, and these gentlemen certainly acted as auditors of the company. The balance-sheets were prepared and certified by them for the express purpose of being laid before the shareholders, and for their services they were paid by the company, their account having been rendered to the company expressly "for auditing." They were appointed to

(1) [1895] 2 Ch. 166.
(2) [1896] 1 Ch. 6.
(3) [1895] 2 Ch. 173.
(4) (1887) 36 Ch. D. 787.
(5) (1880) 14 Ch. D. 660, 664.
(6) (1875) L. R. 10 Q. B. 329, 337.

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frame a balance-sheet, and were asked to act as auditors, which they did.

Hastings, Q.C., in reply. In *Coventry and Dixon's Case* (1) there was a formal election to the office. The decision of the Master of the Rolls in that case can only be regarded as a dictum, because it was reversed on appeal. *Gibson* v. *Barton* (2) is inconsistent with what was said in *In re Kingston Cotton Mill Co.* (3) There is no authority for the proposition that in order to make a person liable under s. 10 it is sufficient merely to prove that he took upon himself to act as auditor. The mere discharge of the duties of an office does not take the place of a regular appointment to that office for the purpose of bringing any one within the jurisdiction of s. 10.

Cur. adv. vult.

Jan. 27. Stirling J., after stating the facts:—The question is one of procedure. It is not disputed that an action might be brought against these gentlemen in respect of any misfeasance of which they were guilty. But the question whether auditors are officers of the company within the meaning of s. 10 of the Act of 1890 is one of general importance; and it may possibly in this case have a special importance to the applicants; for if the remedy is by action the applicants may have a defence to it based on the Statute of Limitations which would not be available in the present proceeding. Now, if the matter were entirely free from authority, there would be much to be said in favour of the view that auditors are not officers of the company within the meaning of s. 10 of the Act of 1890; but the matter has been dealt with by the Court of Appeal in two cases, namely, *In re London and General Bank* (4) and *In re Kingston Cotton Mill Co.* (3); and I am bound not merely by the decisions, but by the principles on which those cases were decided. The former case was decided with reference to a banking company, one of a class of companies as to which special provisions on the subject of audit are contained in the Companies Act, 1879. I do not go into that in detail because in the second

(1) 14 Ch. D. 660, 664.
(2) L. R. 10 Q. B. 329, 337.
(3) [1896] 1 Ch. 6.
(4) [1895] 2 Ch. 166.

case Lord Herschell thus explained the ratio decidendi (1): "I desire to express no opinion upon the question whether *In re London and General Bank* (2) was rightly or wrongly decided. It may be that the reasoning in that case is open to criticism. It may be that some considerations which bear upon the question were not referred to, or had not full effect given to them; on all that I express no opinion at all. I desire to retain absolute liberty of action, in case it should hereafter become necessary, with regard to the question whether *In re London and General Bank* (2) was rightly decided. Let us see what *In re London and General Bank* (2) did decide. It decided that the auditors appointed in that case were officers within the meaning of the section. On what grounds? Under the Act of 1879 certain articles contained in Table A, which, prior to that Act, companies might either adopt or reject as they pleased, became by statute absolutely binding on banking companies. That, even if not strictly accurate, is sufficiently accurate for the purpose of this case. Under that Act banking companies were compelled to appoint auditors, and certain provisions were made applicable to them, which were in substance the provisions of Table A so far as auditors are concerned. Now, the London and General Bank, besides these, what I may call compulsory articles, had also articles of its own. The reasoning in that case was rested largely, I may say mainly, on this—that the auditors were, by the provisions of the Act of 1879, which were made applicable to the bank, made officers of the company. The language of those provisions was dwelt upon as shewing that they were officers of the company. It is true, and here comes the distinction suggested, that in the articles in that case they were so denominated in an indemnity clause, whereas in the present case they are not so denominated." Here I have an indemnity clause in which the auditors are described as officers of the company. Then his Lordship says: "But it would be far too narrow a distinction to rest any difference of decision on that ground. If the provisions as to misfeasance of officers extended to the auditors in the case of the London and General Bank, it seems to me that no substantial reason can be given why

(1) [1896] 1 Ch. 16. (2) [1895] 2 Ch. 166.

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they should not extend to the auditors in the present case. I cannot in substance distinguish the two cases. The reasoning which led to the conclusion in the one case seems to me necessarily to lead to it in the other." In that case, though doubt was thrown upon the accuracy of the previous decision, it was followed, and the auditors were held to be officers of the company.

If, then, Messrs. Parsons & Robjent had been duly elected auditors of the company at the general meeting held in 1888, the present case could not have been distinguished from those to which I have referred. They were not, however, so elected, and the question is whether that circumstance entitles them to say that they are not officers of the company. Now, in *Coventry and Dixon's Case* (1) it was held by Jessel M.R. that de facto directors were subject to the provisions of s. 165 of the Companies Act, 1862, of which s. 10 of the Act of 1890 is an extension. The decision of the Master of the Rolls was reversed on appeal, but the judgments of James L.J., Baggallay L.J., and Bramwell L.J. shew that they agreed with this portion of his judgment. I think that the same thing applies to auditors. It seems to me that persons who have de facto acted as directors and officers of the company ought not to be allowed to escape from the jurisdiction created by such enactments as s. 165 of the Act of 1862 and s. 10 of the Act of 1890, by setting up defects in their own title to hold such positions. If a person duly elected to fill the office of auditor be subject to this jurisdiction, in my judgment a person who de facto fills the office is also subject to it.

The only question which remains is whether the applicants did de facto fill the office of auditors. They were, in the language of art. 125, employed "to examine the accounts of the company" and to "ascertain the correctness of the balance-sheet" for the year ending December 31, 1889. They knew that the balance-sheet and the certificate of its correctness would be laid before a general meeting, and that they were to be treated as auditors for the purpose of that balance-sheet. They were paid by the company. Finally the shareholders,

(1) 14 Ch. D. 660.

who knew that they had never been appointed auditors by a general meeting in accordance with art. 128, made no objection to receive their report, and acted on the footing that they were the auditors of the company.

I think that, upon the assumption which I am bound to make, that the cases of *In re London and General Bank* (1) and *In re Kingston Cotton Mill Co.* (2) were well decided, the applicants were properly made respondents to the misfeasance summons, and that the present application ought to be refused.

G. A. S.

From this decision Messrs. Parsons & Robjent appealed. The appeal was heard on February 24, 1897. C. A.

Eve, Q.C., and *Frank Evans*, for the appellants. The appellants were never appointed to the office of auditors of the company. They were simply called in by the directors to do a single act of service on a particular occasion for which they were paid a fee of 12*l.* 12*s.* They looked upon themselves as acting for the directors, they were never brought into contact with the shareholders, and they never were officers of the company in any sense of the word.

[In addition to the authorities cited by them in the Court below, they referred to *In re Imperial Land Company of Marseilles* (3), *Carter's Case* (4), and *In re Liberator Permanent Benefit Building Society*. (5)]

Buckley, Q.C., and *Edwin Ward*, for deputy official receiver and liquidator. Although Messrs. Parsons & Robjent were never formally appointed, they knew that they were employed to make a report as to the accounts of the company which was to be submitted to the shareholders in general meeting and to form the basis of a dividend—in other words, that they were to perform the duties of auditors for the shareholders. A person who is de facto an auditor cannot be heard to say that he is not de jure an auditor. The appellants took upon themselves the responsibility of discharging the duties which the

(1) [1895] 2 Ch. 166.
(2) [1896] 1 Ch. 6.
(3) (1870) L. R. 10 Eq. 298.
(4) (1886) 31 Ch. D. 496.
(5) (1894) 71 L. T. (N.S.) 406.

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properly appointed auditors would have had to do, and they are to all intents and purposes auditors "de son tort," and officers within the meaning of s. 10 of the Act of 1890.

Frank Evans, in reply.

Cur. adv. vult.

March 11. Lindley L.J. This is an appeal by Messrs. Parsons & Robjent from an order of Stirling J. refusing to stay proceedings taken against them by the liquidator of the above company, under s. 10 of the Companies (Winding-up) Act, 1890. The question raised by the appeal is whether Messrs. Parsons & Robjent are liable to be proceeded against under that section as "officers" of the company. To answer this question it is necessary to ascertain who Messrs. Parsons & Robjent are, and what they have done. They were accountants employed by one of the directors of the company to audit the accounts of the company and to prepare a balance-sheet for the year 1889, to be laid before the shareholders at their annual general meeting. This they did; and they signed, per pro., a certificate at the bottom, worded thus: "We have carefully examined the accounts of the Western Counties Steam Bakeries and Milling Company, Limited, and find the same to be in accordance with the above balance-sheet, which shews the correct financial position of the company." The accounts were, in fact, examined and the balance-sheet was prepared by a clerk of the firm, and he signed the name of the firm at the bottom of the certificate; but no reliance was placed by the appellants upon this circumstance. They admitted their clerk's authority to act for the firm, and they admitted their own liability for what their clerk did. A similar course had been pursued the year before, but the liquidator only proceeded against the appellants in respect of what they did with reference to the accounts for 1889. Messrs. Parsons & Robjent were paid 12*l.* 12*s.* for their services in respect of the accounts of 1889 by a cheque of the company. These are the whole of the material facts.

Now if s. 10 of the Companies (Winding-up) Act, 1890, contained the word "auditor" it might well be that Messrs. Parsons & Robjent, having acted as they did, could not be heard

to say that they were not auditors, and s. 10 might well apply to them. I think this would be so, and *Gibson* v. *Barton* (1) and *Coventry and Dixon's Case* (2) are authorities to shew that it would. But the word "auditor" is not in the section, and what has to be determined is whether Messrs. Parsons & Robjent are officers of the company, or have so acted that they cannot be heard to say that they were not. If all persons who did auditor's work for a company were officers of the company the case would be easy; but no decision has yet gone this length, and if that were the law the careful examination of the Acts of Parliament and articles of association made in the cases of *In re London and General Bank* (3) and *In re Kingston Cotton Mill Co.* (4) would have been quite unnecessary.

An auditor may or may not be an officer of a company. So may anybody else—e.g., a banker or solicitor. Primâ facie such persons are not officers. See as to bankers, *In re Imperial Land Co. of Marseilles* (5); as to solicitors, *Carter's Case*. (6) But if appointed to an office under the company, and if they act in that office as officers of the company, they will be officers within s. 10. That was decided in the case of *In re Liberator Permanent Benefit Building Society* (7), and no irregularity in their appointment would, I conceive, avail them. But to be an officer there must be an office, and an office imports a recognised position with rights and duties annexed to it, and it would be an abuse of words to call a person an officer who fills no such position either de jure or de facto, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word.

Turning to the articles of association of this company, we find that the office of auditor is provided for: appointments to it are made, not by the directors, but by the shareholders in general meeting (art. 126); the office is annual (art. 126); the remuneration is fixed by the shareholders (art. 128); they can re-elect him on his quitting office (art. 129); his duties are expressly stated

(1) L. R. 10 Q. B. 329.
(2) 14 Ch. D. 660.
(3) [1895] 2 Ch. 166.
(4) [1896] 1 Ch. 6.
(5) L. R. 10 Eq. 298.
(6) 31 Ch. D. 496.
(7) 71 L. T. (N.S.) 406.

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(arts. 131 and 133); and large powers are conferred upon him in order to enable him to perform those duties (art. 132). Messrs. Parsons and Robjent performed the duties which an auditor would have had to perform; but it appears to me that they were no more de facto than they were de jure officers of the company. They were simply accountants, called in by the directors to do a piece of work, and they never were and never pretended to be or acted as if they were anything else.

In my opinion Stirling J. has regarded the decisions in the cases of *In re London and General Bank* (1) and *In re Kingston Cotton Mill Co.* (2) as going considerably further than they did. They decided two points only—namely, first, that auditors might be officers within s. 10, a proposition which in the first case was very stoutly disputed; and, secondly, that the auditors in those cases were officers of the companies then in question; that is that the persons there held to be within s. 10 really filled the office of auditor in those companies respectively. The appeal must be allowed with costs here and below, and all proceedings against the appellants under s. 10 of the Companies (Winding-up) Act, 1890, must be stayed.

A. L. Smith L.J. The question raised in this appeal is whether the liquidator of the Western Counties Steam Bakeries and Milling Company, Limited, can take proceedings in a summary way by means of what is called a misfeasance summons under s. 10 of the Companies (Winding-up) Act, 1890, against Messrs. Parsons & Robjent, as being officers of that company. If they were officers of the company upon January 30, 1890, when they certified the correctness of the company's balance-sheet for the year 1889, they may be proceeded against by means of such summons, otherwise they cannot be. Lindley L.J. has stated the facts of the case, and I do not further allude to them.

It has been held by this Court in the case of *In re Kingston Cotton Mill Co.* (2), following the case also in this Court of *In re London and General Bank* (1), that where a company, having articles of association similar to those in the present case, has appointed a person to the office of auditor of the

(1) [1895] 2 Ch. 166. (2) [1896] 1 Ch. 6.

company such person is an "officer" within the meaning of s. 10 of the Companies (Winding-up) Act, 1890, which runs thus: "Where any director, manager, liquidator, or other officer of the company" has done certain acts, he may be proceeded against as in the section mentioned by means of a misfeasance summons.

It having thus been held that a person appointed by a company to the office of auditor of the company is an officer within the meaning of the section, we are now asked to take a step further, and to hold that a person who has never been appointed to the office of auditor or to any other office in the company at all is nevertheless an officer of the company if he has performed work which an auditor, if he had been appointed by the company to the office of auditor, would have undertaken and performed. The argument of the liquidator is that the undertaking to perform and the performance of auditor's work upon any given occasion makes a person an officer of the company within s. 10, although he has never been appointed to that, or to any other office in the company; and it is said that decided cases shew this to be so.

The first case which is relied upon is that of *Gibson* v. *Barton* (1), where Blackburn and Lush JJ. held, Quain J. dissenting, that a man who performed the work of a manager of a company became thereby the de facto manager, and consequently was within the terms of an Act which enacted that every "manager" who should knowingly and wilfully authorize, or permit a default being made in forwarding a list of members to the Registrar of Joint Stock Companies, should incur a penalty. These two learned judges held that "manager" in the Act meant manager de facto, and that a person who performed manager's work became thereby manager. But how does this establish that a person who performs auditor's work becomes an officer of the company? If the words of the section had included the word "auditor" the case would have been applicable, but no such word is in the section. I agree that performing the work of an auditor shews the person to be a de facto although he may not be a de jure auditor; but, to succeed, the liquidator must shew that the person is a de facto "officer."

(1) L. R. 10 Q. B. 329.

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Some auditors are officers of a company and some are not. Those who are officers are within the section, but not those who are not officers. It is no good shewing that a person performs auditor's work; it must be shewn that he is a de facto officer of the company.

The next case is *Coventry and Dixon's Case*. (1) There two directors did the work of directors without being qualified to be directors. Sir George Jessel held them to be de facto directors although they were not de jure directors, and as such to be liable to be proceeded against summarily by way of a misfeasance summons as being directors of the company, who are persons designated in the section to be proceeded against. When this case was under appeal (it was reversed upon another point) Bramwell L.J. said if he (that is, the director) has done anything wrong as a de facto director no doubt he can be got at under the clause. In this I agree, and if Messrs. Parsons & Robjent had done anything wrong as de facto officers they could be got at; but they have done nothing of the sort, for the simple reason that they have never become officers of the company at all. When examined, *Coventry and Dixon's Case* (1) is only the case of *Gibson* v. *Barton* (2) over again. I agree that doing the work of a director may make a person a de facto director, and the section enacts that a director may be proceeded against by summons. Doing the work of a manager may make a person a de facto manager, and the section enacts that a manager may be proceeded against by summons. So in the case of an auditor. Doing the work of an auditor may make a person a de facto auditor, but the section does not make an auditor liable to be proceeded against; it is only when he is de facto or de jure an officer of the company that he can be proceeded against by summons under s. 10.

In this case Messrs. Parsons & Robjent were neither de facto nor de jure officers of the company; then how can they be said with truth to be officers of the company? All that this Court has heretofore held is that an auditor may be proceeded against by summons if he is de facto an officer of the company. It has not held that a man may be proceeded against by

(1) 14 Ch. D. 660. (2) L. R. 10 Q. B. 329.

summons when he is neither de facto nor de jure an officer of the company.

For these reasons I think my brother Stirling went too far in holding these applicants liable. The question is not that which the learned judge put to himself—namely, were the applicants de facto auditors. The question is, were they de facto officers? In my judgment the application to stay proceedings upon the summons should have been granted, and this appeal must be allowed.

Rigby L.J. I have had the benefit of reading the judgment that has been given by my brother Lindley, and I entirely agree with it. I will not, therefore, repeat anything that he has said. I will only supplement it, out of deference to the learned judge in the Court below, by a few observations that appear to me to have some bearing on the case. First of all, on the question whether these gentlemen were officers of the company, I should treat the case as if they had themselves done the work and signed the certificate. That is the way in which it seems to have been treated, and very fairly and properly so. Now what mark of an office is there about anything that they did? They were, I take it, simply asked by the directors to do certain work that any accountant might do as an accountant. They simply did that work. I cannot see that they could in any point of view be deemed to be officers of the company. They had no rights. They were simply servants for the time being employed by the board of directors, and I quite assume rightfully employed; but the directors could have dismissed them at any moment if dissatisfied with anything they were doing. The directors could have said, "Do nothing more," and, subject to the question of how much these gentlemen ought to be paid, the directors could have dispensed with their services altogether. As I understand the matter, that cannot be the position of "officers." An officer must hold office. I do not mean to say that he cannot be removed, but he must be removed upon just cause. The mere whim or pleasure of the directors here might have removed these gentlemen and have disentitled them altogether to go on with the audit. If the directors had chosen, they might have appointed

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some other person or persons to do the work; and if Messrs. Parsons & Robjent had made any observation the directors did not like, I do not see that they were bound by the constitution of the company, whatever they might be in fair dealing, even to lay the result of this so-called audit before the company. I cannot see that these gentlemen were in any sense officers. Now, with regard to the authorities. The view that I take of *Gibson* v. *Barton* (1) is a very simple one. The Act of Parliament mentioned "manager," and the decision of the majority of the Court in that case was that in the Act the word "manager" meant the person who manages. It was not a question of office at all. It could not be so, because in that particular case, according to the view taken by the majority of the Court, there was no office of manager in the company at all. That is made clearer, I think, by the way in which Quain J., the dissentient judge, treated the case. He thought that there were managers, but that those managers were the directors—the managing body. But the majority of the Court considered, rightly or wrongly, that the appellant Gibson managed the affairs of the company; they held that he was manager within the 26th section of the Act, because as a matter of fact, without becoming an officer, he did unquestionably manage the affairs of the company.

Frank Evans. Having regard to the refusal of the liquidator to give security for costs, there should be an order on him to pay the costs personally: *In re Powell & Sons.* (2)

Buckley, Q.C. This is not a substantive application, and the appellants ought to have an order only for costs "out of the assets of the company": *Salisbury-Jones and Dale's Case.* (3)

Lindley L.J. The order will be that the costs shall be paid by the liquidator.

Solicitors: *Woodcock, Ryland & Parker, for Vaughan & Hornby, Newport, Mon.; Talbot & Tasker, for Dixon & Dixon, Bristol.*

(1) L. R. 10 Q. B. 329. (2) [1896] 1 Ch. 681. (3) [1895] 1 Ch. 333.

W. W. K.

In re FLOYD.
FLOYD *v.* J. LYONS & CO.

[1896 F. 1597.]

C. A. 1897 *March* 9, 12.

Lease—Water Rate—Covenant by Lessor for Payment of all Water Rate imposed or assessed upon the Premises—Water supplied for Domestic Purposes—Water supplied for Trade Purposes—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17)—*New River Company's Act*, 1852 (15 & 16 *Vict. c. clx.*), *ss.* 36, 38, 40.

Under a covenant by the lessor, in a lease, to pay "all water rate imposed or assessed upon the premises or on the lessor or lessees in respect thereof," the lessor is not bound to pay for water supplied by the water company to the lessees for trade purposes.

By an indenture of lease dated January 11, 1895, the plaintiff, Mrs. A. C. Floyd, demised to defendants, J. Lyons & Co., Limited, who carry on business as refreshment contractors, the ground-floor and basement of Nos. 19 and 20, Walbrook, in the City of London, for the term of thirty years from December 25, 1894, at the yearly rent of 450*l.*; and the lease contained a covenant by the lessor to pay "all rates, taxes, and assessments, water rate, and other outgoings, except the gas and electric light, now or hereafter to be imposed or assessed upon the said premises or on the lessor or lessees in respect thereof."

The demised premises communicated with and were occupied by the defendants in connection with the ground-floor and basement of No. 20, Budge Row, in which the plaintiff had no interest, and the whole of these premises (both in Walbrook and Budge Row) were used by the defendants as a café for the sale and consumption of tea, coffee, and light refreshments. Water was supplied by the New River Company to the whole of the premises so occupied by the defendants, which were rated at an annual value of 550*l.*, and the yearly water charge made by the company was 47*l.* 8*s.*, which was made up as follows:—

3 per cent. on annual value, 550*l.*	£16 10 0
2 water-closets	0 18 0
Trade	30 0 0
	£47 8 0

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The defendants had paid this charge, and, attributing one-half of it to the Walbrook premises, and one-half to the Budge Row premises, they deducted one-half of the whole amount from the rent they paid to the plaintiff. The plaintiff was content that one-half of the total annual value of 550*l.* should be treated as attributable to the Walbrook premises, and did not object to the deduction from her rent of one-half of the 16*l.* 10*s.* and the 18*s.*, but she objected to the deduction of one-half of the 30*l.*, on the ground that the 30*l.* was a charge for water used for the trade purposes of the defendants, and was not within the term of her covenant. She had never made any agreement with the New River Company for the supply of water for other than domestic purposes; she had always given receipts "on account" only for the payments made to her by the defendants; and this was an originating summons taken out by her in order to have the question of her liability under the covenant decided by the Court. (1)

The summons was adjourned into court, and came on before Kekewich J. on December 17, 1896, when his Lordship held

(1) The New River Company's Act, 1852 (15 & 16 Vict. c. clx.), incorporated the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and the material provisions of the first-named Act are shortly as follows. By s. 35 the company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits entitled to demand the same, furnish to such owner or occupier "a sufficient supply of water for domestic purposes," at a rate which for water supplied to any dwelling-house is a percentage upon the annual value of the house, with additional rates of fixed sums varying according to the annual value of the house for each water-closet, fixed bath, or high service. By s. 38, "A supply of water for domestic purposes shall not include a supply of water for steam-engines or railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for baths, horses, cattle, or for washing carriages, or for gardens, fountains, or ornamental purposes, or for flushing sewers or drains, or for any trade or manufacture or business requiring an extra supply of water." By s. 39, "The company may, notwithstanding the provisions of this Act or any Act incorporated therewith, take an increased rate or charge by agreement with the person or body requiring a supply of water, and notwithstanding the same may exceed the rates or charges herein specified." By s. 40, "The company may supply any person or body within their limits with water, to be used within such limits for other than domestic purposes, at such rates and upon such terms and conditions as shall be agreed upon between the company and the person or body requiring such supply."

that the covenant extended to the charge made by the New River Company for water used for trade purposes.

The plaintiff appealed.

Cutler, Q.C., and *MacSwinney*, for the plaintiff. The charge made by the water company for the supply to J. Lyons & Co. of water for the purposes of their trade is not a "water rate or other outgoing imposed or assessed upon the premises or on the lessor or lessees in respect thereof." The statutes divide payments for water into two categories: (1.) water for domestic purposes which on the request of the owner or occupier is supplied at an ad valorem rate, and which (s. 38 of 15 & 16 Vict. c. clx.) does not include water supplied for trade purposes; and (2.) water supplied for other than domestic purposes by agreement between the company and the person requiring it. This latter supply is the one now in question, and it cannot be treated as a rate imposed or assessed at all upon the defendants in their character of lessees. It is supplied to them through an independent bargain made by them with the company. There is no limit to the amount of water a trader might require for business purposes, and he might agree to pay for it a sum larger than the rent the lessor receives; and, according to the contention of the respondents, under such a covenant as this the lessor would have to pay it.

Alexander, Q.C., and *Theodore Ribton*, for the respondents. The key to the true construction of this covenant lies in the exception of the gas and electric light, which shews that, in the view of the parties, the covenant, but for that exception, would have included both the subjects of the exception, and consequently that the expression "all water rates and other outgoings" must receive a construction wide enough to comprise water supplied for trade purposes as well as water supplied for domestic or house purposes: *Williams* v. *Mercier* (1); *Direct Spanish Telegraph Co.* v. *Shepherd*. (2) In the case of *Badcock* v. *Hunt* (3) the words "all water rate" did not occur in the covenant, and the decision was that a water rate was not

(1) (1884) 10 App. Cas. 1, 5. (2) (1884) 13 Q. B. D. 202.
(3) (1888) 22 Q. B. D. 145.

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an imposition. But the word "imposed" could not receive so strict a construction in a covenant like the present, and here there is, moreover, the additional word "assessed." A covenant to pay "all water rate" should not be construed as applying to only one kind of water rate; it should include both kinds unless there is something in the instrument to restrict it. Here the lease contains provisions shewing that the respondents required the premises for business and not for residential purposes, and, moreover, for a business in connection with which a large supply of water would be required. The argument of the appellant that the charge for water for trade purposes is not comprised in the covenant must equally apply to the charge for water for domestic purposes, which involves the striking out of the words "all water rate" from the covenant.

[They also referred to *Sheffield Waterworks Co.* v. *Wilkinson.* (1)]

No reply was required.

LINDLEY L.J. stated the facts of the case and the material provisions of the New River Company's Act, and continued:— Now it appears that the defendants want water for their premises, and whatever water rate comes fairly within the description of a "water rate imposed or assessed on the premises or on the lessors or lessees in respect thereof," the lessor, Mrs. Floyd, is to pay. That she bargained for. But they also want water for the purposes of their trade, and a considerable portion of their water rate, using the word "water rate" in the wide sense, is for their trade purposes. The question then is, whether Mrs. Floyd is or is not bound under the covenant contained in the lease to pay so much of that water rate as is charged for the trade purposes as distinguished from the house purposes. That depends upon the language of the covenant. One would have thought, on looking at the substance and good sense of the thing, that what the lessor agreed to pay for was the water supplied to the house for house purposes, and not the water supplied for trade purposes. She has nothing to do with

(1) (1879) 4 C. P. D. 410, 424.

the trade these people carry on. But then it is said that the words are "water rate and other outgoings, except gas and electric light, now or hereafter to be imposed," and Mr. Alexander's first point is that the exception of gas and electric light shews that water rate is used in a larger sense than I have suggested. But it does not appear to me that those words which follow, namely, "rates, taxes, and assessments and other outgoings," extend what I may call the sensible construction of the words "water rate" "imposed or assessed upon the said premises or on the lessor or lessees in respect thereof." Those words are all-important. They shew that, notwithstanding the words "water rate," it is not all the water rate, but it is all the water rate "imposed or assessed on the premises." It so happens, when you come to look at the Waterworks Clauses Act and the special Act governing this company, that no water rate is in the strict sense "imposed or assessed on the premises or on the lessee or lessor in respect thereof." The rate is a mere money demand to be paid by the person who wants the water, and if he does not pay it there is power to cut the water off. As was ruled in *Badcock* v. *Hunt* (1), a water rate is not a charge on property.

Then it is contended for the respondents that, according to the appellant's construction, the words "water rate" must be struck out from the covenant altogether. My answer is, No. The language used, "imposed or assessed on the said premises," shews plainly enough what kind of water rate the lessor was to pay. It means the water rate which is payable in respect of the houses under s. 35 of the special Act of this company, and it does not mean rate for any water which the tenant may want for trade purposes. Such a water rate does not legitimately fall within the expression "water rate imposed or assessed on the premises or the lessor or the lessee in respect thereof." I think Kekewich J. has come to a wrong conclusion. He has given too little weight to the words "imposed or assessed," which, though the rate is not technically "imposed or assessed," shew plainly enough what the meaning of the covenant was. The appeal must be allowed.

(1) 22 Q. B. D. 145.

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A. L. Smith L.J. I am of the same opinion. The question is a very short one, and it turns on a very short covenant. I will read it presently. If it had not been for the ingenious argument of Mr. Alexander, into which he introduced one or two cases which he said bore on the subject, I do not think I should have had the slightest difficulty in construing the covenant, and I confess I have no difficulty even now. It is so clear that, unless one embrangles it with cases, you cannot miss the intention of the parties.

The facts are these. By the New River Company's Act, if a man wants water for his house for domestic purposes he may apply to the company under s. 35, and the company must supply it; and, if the company supply it, then they have a right at law to charge him an ad valorem rate. There is a further section, s. 40, which enacts that if a man does not want it for his house for domestic purposes, he may get water from the company by agreement, and he may get as much as he likes as long as they will supply it to him; but this must be a matter of bargain between the man who wants the water and the company, not only as to how much the company will supply, but as to the price at which they will supply it.

Now in this case Mrs. Floyd let the premises at Walbrook to the defendant company, who were about to carry on the business of refreshment contractors thereon. She let the ground-floor and basement of two houses. The defendants wanted not only water for domestic purposes, but they wanted water for trade purposes; and by agreement with the New River Company that company supplied them with additional water at the annual rent of 30*l*. The defendants assert that as Mrs. Floyd is bound to pay all the water rates, and the 30*l*. is a water rate, so she must pay it. Mrs. Floyd says, "No, the 30*l*. is not a water rate within the covenant; it is for water obtained agreement, and it is not therefore what she bargained to pay by for under the covenant."

One of the arguments was, that it was enacted by the old Waterworks Clauses Act of 1847 that "the expression water rate" shall include any "rent, reward, or payment to be made

to the undertakers for a supply of water." That is true enough; but the question is, What is the meaning of "water rate" in this covenant? The covenant seems to me perfectly clear. It is, that the lessor "will pay all rates, taxes, and assessments, water rates, and other outgoings." If it stopped there it would not have been so favourable to the lessor; but it goes on: "except the gas and electric light." Mr. Alexander contends that this exception is in his favour, because the probable meaning of it is that she would pay all rates except gas and electric light. I do not agree to that; but I will pass on to the important words: "now or hereafter to be imposed or assessed upon the said premises or on the lessor or lessees in respect thereof." How can a private bargain between the lessee and the water company be said to be a water rate "now or hereafter to be imposed or assessed" on the premises. It is impossible. Unless you strike out those words, and read the clause without them, the case fails altogether. You cannot strike them out; and I think my brother Kekewich has therefore come to a wrong conclusion.

RIGBY L.J. I am of the same opinion. I do not think that the right way to construe a covenant like this is to go through all the Acts of Parliament and find out precisely what is the provision of each Act of Parliament, and then argue as if the parties had thoroughly acquainted themselves with all the provisions of the Acts, and had really intended that the words they used should have quite a strict reference to these provisions. I think, if it is possible to place a reasonable meaning upon the words you find in this covenant, you should do so notwithstanding that the words used are not perfectly accurate with reference to the existing state of things. But I do not think there is any difficulty about the matter.

In my opinion, the words in the covenant, "the water rate imposed or assessed upon the premises or the lessor or lessees in respect thereof," fall within s. 35 of the Act of 1852, which provides for a sufficient supply of water for domestic purposes at a water rate which, according to the provisions of that section, is in effect "assessed" upon the annual value of the house.

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I leave out the word "imposed," because in *Badcock* v. *Hunt* (1) it was said that the word "imposed" might mean an obligatory charge. But the word "assessed" means reckoned on the value. It is not accurate to say "assessed on the premises"; but it is not very far from accurate to say that a water rate is a rate assessed upon the lessees in respect of the house. That is very nearly accurate. At any rate, it is so near that I have not the remotest doubt that in the ordinary acceptation of the words it would be taken that that was one of the things meant. So that, if we leave out this particular charge for trade purposes, we are not reduced to the necessity of leaving out every water rate, as has been contended in argument.

Now let us consider the matter a little further. Whatever for the purposes of the general Act may be the meaning of the words "water rate," and they probably are so general that nothing paid for water can be taken out of them, in this Act, when you come to s. 40, it is a rate which is not assessed upon the person in respect of the premises, but is entirely free from any reference to premises—it is only to be a matter of bargain between the person who wishes to have the supply and the company which is authorized and willing to give the supply. It is perfectly plain that you may carry on a very large trade in a very small house, or on premises of small value; while in dealing with questions under s. 35, the annual value of the house approximately determines the amount you are to pay. Therefore I do not see how it is possible fairly to say that the rates charged in s. 35 are not within the covenant; or, on the other hand, how it is possible to say that the rates charged under s. 40 for trade purposes fall within it.

Then it was said that the words in the covenant, "except the gas and electric light," prove that you must pay all rates whatever. I do not agree with that. Many an exception is put in, though the parties had not intended to assert that what was not included in the exception was also included in the rule. They say, "Mind, we shall not pay for gas or electric light, and we will except them so as to be quite safe"; and I do not

(1) 22 Q. B. D. 145.

think any such conclusion as Mr. Alexander sought to induce us to draw can fairly be drawn from those words. The water supplied for trade purposes is not, in my opinion, within the covenant, and the appeal must be allowed. As regards the water supplied for domestic purposes, I think the lessor is well advised not to contest the payment. The appeal will be allowed with costs here and below.

Solicitors: *Edward Lee & Davis; Thomas G. Bullen.*

W. W. K.

NORTH J.
1897
Feb. 16, 17, 18.

LONDON AND COUNTY BANKING COMPANY *v.* GODDARD.

[1896 L. 896.]

Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 12, *sub-s.* 1—"*Trustees for performing the Trust*"—*Mortgage—Vesting Declaration.*

A mortgagor of land by deposit of deeds declared himself trustee of the legal estate for the mortgagee:—

Held, that new trustees appointed in lieu of the mortgagor by the mortgagee were "trustees for performing the trust" within the meaning of s. 12, sub-s. 1, of the Trustee Act, 1893.

The mortgagor conveyed the fee to a subsequent incumbrancer with notice of the prior mortgage:—

Held, that a vesting declaration in the deed appointing new trustees operated to vest the legal estate in them.

THIS was the trial of a mortgagee's action relating (inter alia) to a mortgage by deposit of deeds and deed of charge on a freehold house called Hengisbury House and three freehold building plots at Brentford.

The premises were, by deed of reconveyance dated July 20, 1882, vested in fee in Samual Goddard. Some time previously to March, 1886, Samuel Goddard conveyed the premises by way of sale to one Burford, who mortgaged the premises in fee to Batcock and King; the equity of redemption was subsequently purchased by Samuel Goddard, and the premises were conveyed to him, subject to the mortgage to Batcock and King, by deed dated August 26, 1887. On July 1, 1890, Samuel Goddard deposited the deed of August 26, 1887, with George Barrell by way of equitable mortgage of the premises to secure a sum of 200*l.* then advanced by George Barrell with interest.

On February 20, 1894, Samuel Goddard paid off the money due on the legal mortgage to Batcock and King, and took a reconveyance of the fee simple of the premises, and received the title-deeds relating to the premises down to and including the mortgage to Batcock and King. Later on the same day (February 20, 1894) he deposited with the Ealing branch of the London and County Banking Company the earlier title-deeds

relating to the premises down to and including the reconveyance to himself in fee dated July 20, 1882, as part security with documents relating to other property for all money for the time being owing by him to the bank. The deeds and dealings with the premises subsequent to July, 1890, were concealed from the knowledge of the manager of the bank. At the same time Samuel Goddard executed a deed-poll addressed to the bank, charging all his present and future estate and interest, both legal and equitable, in the premises comprised in the deposited documents. The deed-poll contained an undertaking by the mortgagor to execute when called on a legal mortgage and a power of sale in the mortgagee. It then proceeded: "And I declare that during the continuance of the present security I will hold all my estate and interest in the premises hereby charged in trust for you as such mortgagees thereof as aforesaid and will convey the same as you or your general manager or any of your general managers for the time being shall on your behalf as such mortgagees direct, and I authorize you or your general manager or any of your general managers for the time being on your behalf as such mortgagees during the continuance of the present security to remove me or any other person from being a trustee in respect of the trust hereinbefore declared and to appoint yourselves themselves or himself or any other persons or person to be trustees or a trustee in respect of the said trust premises and thereupon to make a declaration vesting all my estate and interest in the same premises in such new trustees or trustee and I hereby irrevocably appoint your said present general managers and every two and one of them and all and every persons and person appointed substitutes or substitute as hereinafter mentioned jointly and severally my attorneys and attorney for me and on my behalf and as my act and deed to make execute and deliver every or any such further mortgage or mortgages as aforesaid or (without executing any such mortgage) to make execute and deliver any conveyance of all my present and future estate and interest in the said premises or any part thereof to any purchaser or purchasers thereof on a sale by you as mortgagees and I authorize you to appoint any substitutes or substitute for all or any of my attorneys

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hereinbefore appointed or for his or their substitutes or substitute in respect of all or any of the matters aforesaid and from time to time to remove at your pleasure or accept the resignation of any such original or substituted attorneys or attorney respectively and I undertake to abide by ratify and confirm every matter or thing which such original or substituted attorneys or attorney or any of them shall do or cause to be done under the present deed."

In February, 1896, Samuel Goddard executed a mortgage of the premises in fee to Joseph Goddard, who had notice of the mortgage to the bank, but not of the mortgage to Barrell. The deeds relating to the premises subsequent to the reconveyance of July, 1882 (except the deed deposited with G. Barrell), had previously been deposited with Joseph Goddard, and were in his custody.

Samuel Goddard had since been made bankrupt.

By an indenture dated March 22, 1896, between the London and County Banking Company, thereinafter called the company, of the one part, and William Howard, J. Gray, and J. B. James (joint general managers of the bank) of the other part, it was witnessed that, "in consideration of the premises, and in exercise of the powers for that purpose vested in the company by the thereinbefore recited deed and of every or any other power enabling them in that behalf the company did thereby remove the said Samuel Goddard or the defendant Joseph Goddard or any other person or persons in whom the legal estate in the hereditaments specified in the said schedule to the now stating indenture (being the hereditaments comprised in the said deed of February 20, 1894) was immediately before the execution of the now stating indenture vested from being a trustee or trustees in respect of the trust declared by the thereinbefore recited deed as aforesaid, and the company did thereby appoint the plaintiffs, William Howard, James Gray and Josiah Blaylock James to be trustees in respect of the said trust premises for all the purposes of the said trust. And it was also witnessed that in consideration of the premises the company did thereby declare that all those the lands and hereditaments specified in the said schedule thereto and all other (if any)

hereditaments then subject to the security of the thereinbefore recited deed should vest in the plaintiffs, William Howard, James Gray and Josiah Blaylock James, their heirs and assigns, as joint tenants for all such estate and interest as the said Samuel Goddard had at the date of the said deed of February 20, 1894, or thereafter become entitled to upon the trusts applicable thereto by virtue of the thereinbefore recited deed."

The plaintiffs were the London and County Banking Company and their three joint general managers. The defendants were Joseph Goddard, George Barrell, E. C. Silcock, a person not interested in the subject-matter of this report, and the trustee in bankruptcy of Samuel Goddard.

The plaintiffs claimed, among other relief, accounts, foreclosure, a declaration that they were first mortgagees, and delivery up of all documents of title.

Rawlins, Q.C., and *Vaughan Hawkins*, for the plaintiffs. Sect. 12, sub-s. 1, of the Trustee Act, 1893, makes the vesting declaration contained in the deed of March, 1896, effective to pass the legal estate, which is now vested in the new trustees for the bank. That being the case, as the bank advanced money on their security without notice of any previous incumbrance, they are entitled to priority over every one else. The vesting declaration operated just as the exercise of a power of appointing under a conveyance to uses operated.

There was nothing in the circumstances of this case to render it inequitable for the bank to get in the legal estate, and thus obtain priority: *Taylor* v. *Russell* (1); *Willoughby* v. *Willoughby*. (2)

Ribton, for Joseph Goddard. If I can shew that the legal estate is vested in Joseph Goddard, inasmuch as he had no notice of Barrell's equitable charge, he is entitled to priority over Barrell, who, being prior in point of time to the plaintiffs, takes precedence over them; and therefore Joseph Goddard obtains priority over both.

The plaintiffs rely on s. 12, sub-s. 1, of the Trustee Act, 1893, which gives the appointor of new trustees "to perform any

(1) [1891] 1 Ch. 8; [1892] A. C. 244. (2) (1756) 1 T. R. 763.

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trust" power to make a declaration vesting the estate in the new trustees. The section does not apply, for the mortgagor was not a trustee to perform a trust. This section does not apply to the case of a bare trustee. The Act has itself drawn a distinction between a bare trustee and a trustee to perform a trust in the 16th section, by which a married woman who is a "bare trustee" is empowered to convey as if she were a feme sole.

Again, sub-s. 3 of s. 12 excepts from the operation of the section land conveyed by way of mortgage, shewing that it is not intended to apply to cases between mortgagor and mortgagee. There is in fact no trust relationship between a mortgagor and mortgagee; and the definition of trust excludes the duties incident to an estate in mortgage. See *In re Osborn's Mortgage Trusts* (1), where it was held that a vesting order could not be made under the 10th section of the Trustee Act, 1850, to vest the legal estate on a sale, one mortgagee being abroad.

If it were possible that a vesting declaration could have operated to take the legal estate out of Samuel Goddard and vest it in trustees appointed in his place, Joseph Goddard, to whom the legal estate was conveyed for value, was no trustee, and the estate was not divested from him.

Swinfen Eady, Q.C., and *Harry Greenwood*, for Barrell. We also contend that the legal estate is vested in Joseph Goddard. But even if that is not so, the legal estate has been got in under circumstances which render it inequitable as between the bank and Barrell, the prior mortgagee, that the bank should be preferred: *Taylor* v. *Russell* (2); *Harpham* v. *Shacklock* (3); *Sharples* v. *Adams* (4); *Maxfield* v. *Burton* (5); *Garnham* v. *Skipper* (6); *Saunders* v. *Dehew.* (7)

E. Clayton, for Silcock.

C. E. E. Jenkins, for the trustee in bankruptcy of Samuel Goddard.

(1) (1871) L. R. 12 Eq. 392.
(2) [1891] 1 Ch. 8; [1892] A. C. 244.
(3) (1881) 19 Ch. D. 207.
(4) (1863) 32 Beav. 213.
(5) (1873) L. R. 17 Eq. 15.
(6) (1885) 55 L. J. (Ch.) 263.
(7) (1692) 2 Vern. 271.

Rawlins, Q.C., in reply. There is nothing in the 12th section to limit the class of persons from whom the legal estate is taken in any way; the person in whom it is to be vested is a trustee appointed to perform a trust. The fact that there is no trust relationship between a mortgagor and mortgagee, as necessarily incident to the mortgage, does not prevent a mortgagor becoming a trustee for his mortgagee, or the mortgagee becoming a trustee for the mortgagor, or a trust relationship being expressly added by contract in addition to the ordinary incidents of a mortgage. In mortgages of leaseholds by subdemise it has always been common practice to declare the mortgagor a trustee of the leasehold reversion either for the mortgagee or a purchaser.

NORTH J. (after stating the facts) :—The question is, what is the effect of what has taken place? The necessary formalities have been duly gone through by the bank. The only question is whether what they have attempted to do is legal, and what the effect of it is. I do not see any reason why the scheme of the parties who devised this form of memorandum should not have effect given to it. It is quite true that the bank did not get in the legal estate on February 20, 1894, but they did take, apparently, all the deeds, and they did take a security in such a form as, if it can have the intended legal operation, would give them the legal estate at any moment they chose to take it, and would deprive the mortgagor of the possibility in the meanwhile of finally parting with that legal estate as against them in favour of any other person with notice. The vesting deed is based upon the provisions of the Trustee Act, and upon the provisions of that Act Mr. Ribton has said that this deed is, to put it shortly, a mortgage deed, and that mortgage deeds do not create trusts which come within the scope of the Trustee Act at all. To decide the question so raised it is necessary to refer to certain sections in that Act, and under the group of sections commencing with s. 10 there are several which deal with the appointment of new trustees. The 10th section provides that in certain cases, of which the present is not one, new trustees may be appointed in exercise of the power

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contained in that section in place of other trustees who are for reasons there mentioned unable or unwilling to act; but there is nothing in that section about removing an existing trustee. No doubt if a person had become incapable of acting, a new trustee could be appointed in his place, and to that extent there would be a removal; but there is nothing in terms in the 10th or the 11th sections which deals with the case of a retiring trustee. Then comes the 12th section, which is very important. Sub-s. 1 is: "Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right."

Dealing with that in detail, it refers to a deed by which a new trustee is appointed to perform any trust. Is that the case here? It is said it is not, because it is said that upon the true construction of those words to bring the section into play there must be a new trustee appointed to perform some trust; and that in the present case the sub-section does not apply, because there is no trust to be performed. And it is said that s. 16, where there is a particular phrase, is important in construing the different words of this section. I will read the section. "When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a feme sole." No doubt in that section there is a reference to a bare trustee. It is said that the trustee contemplated by s. 12 is a trustee as contradistinguished from a bare trustee, and is a trustee who must have some substantial duty to perform. I do not follow that criticism on the Act. The words are: "Where a new trustee is appointed to perform any trust"; and I do not see what ground there is for introducing the words "any substantial trust," or to say that any trust is to be excluded from these words—words which are large

enough to apply to any case. In this case it seems to me that a trustee is appointed to perform a trust; and then in the next place it seems to me reasonable that the section should apply to a case where the mortgagor retains the legal estate and declares himself a trustee; for suppose the mortgagor had disappeared altogether, it would be essential that in some way the legal estate should be taken out of him and vested in some one on behalf of the mortgagee; and this section enables that to be done without an application to the Court being necessary.

Passing over the 2nd sub-section, which does not apply, s. 12, sub-s. 3, provides: "This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament."

Now that is dealing with a state of things where a trust has been created and money, subject to the trust, is invested on mortgage of land, and it becomes necessary to appoint a new trustee in whom the land is to be vested. According to the existing practice—a practice introduced in order to enable people to shut their eyes tightly and not see a trust that exists, all mention of the trust is kept off the mortgage deeds: that is done for the purpose of enabling a reconveyance of the land to be made when the mortgage debt is paid without making the existence of the trust known to the persons who afterwards become entitled to the property; but for this provision, when new trustees of the trust fund lent on mortgage were appointed, a vesting declaration might be made which would have the effect of transferring the legal estate in the mortgaged property from the old trustees to the new trustees. If, however, it were the practice to make such vesting declaration, the appointment of new trustees would be a link in the title to the mortgaged property, and notice of the trust would be fixed on the title. It was to avoid that that the words of the sub-section were introduced.

Now it is said that by s. 50, the interpretation clause, the expression "trust" does not include the duties incident to an

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estate conveyed by way of mortgage. This is the old definition of trust from the time of the earliest Trustee Act—a definition well understood in courts of equity. I have always understood it to refer to the principle that during the continuance of a mortgage there is no relationship of trustee and cestui que trust between mortgagor and mortgagee. It is quite clear that if lands in mortgage are sold by the mortgagee there may be surplus proceeds, of which the mortgagee becomes trustee; or after the money has been paid off, if the land had not been reconveyed, there might be a trust of it in the mortgagee. In my opinion this definition relates exclusively to an estate conveyed by way of mortgage while that mortgage security continues to exist as such.

Again, the provision is that a trust does not include the duties incident to the estate. It does not say that no trust shall be created in addition to those incidental duties. I do not see any expression to the effect that a vesting declaration is not applicable to property on mortgage where the instrument of charge contains an express trust. If there is the relationship of trustee and cestui que trust established, there is no reason why the parties should not have the full benefit of the enactment. In my opinion this limitation of the word "trust" does not apply where, in a deed of charge, there is an express declaration that the mortgagor will hold the legal estate on trust. A similar course to that pursued in the case of this mortgage has been adopted for many years in mortgages of leaseholds by demise, where it is desired not to run the risks incident to a mortgage by assignment. Very often a mortgage by underlease is taken in preference to a mortgage by assignment, and it has been usual to insert a declaration that the party mortgaging will hold the immediate reversion in trust for the mortgagee. In the common form, according to my early recollection, the trust was declared in favour of a purchaser under a sale by the mortgagee; but according to precedent books the form of declaration of trust in favour of the mortgagee has been in use for a considerable time.

Again, it was contended that all that could pass by the vesting declaration was the estate at that time existing in the

mortgagor, and that the declaration did not affect any legal estate he had conveyed away. In the first place, I think the vesting declaration was coextensive with the trust previously created, which was expressed to extend to all the present and future estate of Samuel Goddard in the premises, with reference to the date of the mortgage. But it is said that even if that were so, had Samuel Goddard not parted with the legal estate, the legal estate has been conveyed to Joseph Goddard, who is not a trustee against whom a vesting order can be made. What effect the vesting declaration might have had if the legal estate had been conveyed to him without notice of the pre-existing charges I do not express any opinion upon at present, because it is perfectly clear that Joseph Goddard did know of the deposit and charge given to the bank; he knew of the deed of charge, and was affected with notice of its provisions. He must be taken to have known that the person from whom he derived his title had declared himself a trustee of the property for a mortgagee to whom he had given the power to appoint new trustees, and therefore to make a declaration vesting the legal estate in them; and therefore Joseph Goddard could not take the legal estate otherwise than subject to the trust in the deed of charge. In my opinion, therefore, the declaration in the deed appointing new trustees did operate to vest the legal estate in the persons nominated by the bank.

[His Lordship, after referring to passages from the judgments in the House of Lords in *Taylor* v. *Russell* (1), held that there was nothing inequitable as between Barrell and the bank in the mode by which the latter had acquired the legal estate.]

Solicitor for plaintiffs: *Pilley.*

Solicitors for defendant Joseph Goddard: *Woodbridge & Sons.*

Solicitors for defendant Barrell: *Howard & Shelton.*

Solicitors for defendant Silcock: *Ward, Perks & McKay.*

Solicitors for trustee in bankruptcy of Samuel Goddard: *Sole, Turner & Knight.*

(1) [1892] A. C. 244.

D. P.

NORTH J. 1897 *Feb.* 26; *March* 2.

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[1897 H. 404.]

Statute—Construction—Limits of Water Supply—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 52—"*Constructing Waterworks*"—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 57—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 36, *sub-s.* 2—*Alteration of Boundaries.*

The name of a parish, as part of statutory limits of supply, *held* a geographical description not affected by a subsequent division of the parish or alterations of boundary.

The laying pipes by a local authority for the supply of water in a district added to their jurisdiction by order of a county council, as an extension of water supply in their old district:—

Held, not "constructing waterworks" within the meaning of s. 52 of the Public Health Act, 1875.

In the year 1871 the corporation of Huddersfield, the plaintiffs in this action, were supplying water under statutory powers within limits which extended beyond their own borough.

By the Huddersfield Water Act, 1871 (34 & 35 Vict. c. xxiii.), s. 36, the limits of water supply of the corporation were extended to the townships and places described in the 2nd schedule to the Act. Among the places there described was "the township of Mirfield, in the parish of Mirfield." The parish and township of Mirfield were conterminous and were divided into two urban districts, one under the jurisdiction of the local board of Ravensthorpe (the predecessors of the Ravensthorpe Urban District Council, the defendants to this action) and the other under the jurisdiction of the Mirfield Local Board. At that time the Ravensthorpe Local Board were supplying their own district with water taken in bulk from the Dewsbury, Batley, and Heckmondwike water authority. The plaintiff corporation commenced to supply and continued to supply water in the parish of Mirfield outside Ravensthorpe down to the commencement of this action.

On July 11, 1894, a boundary committee of the West Riding of Yorkshire County Council resolved to alter the boundaries

of the civil parishes into which the parish of Mirfield and other parishes were divided, and made an order among other things naming the two altered parishes "Mirfield" and "Ravensthorpe" respectively.

On March 13, 1895, the county council of the West Riding of Yorkshire made an order, afterwards confirmed by the Local Government Board, transferring two small areas from the district of the Mirfield District Council to that of the defendant council. One of the transferred areas, hereafter called the disputed area, comprised about twenty and a half acres.

The defendant council commenced to lay down in the disputed area a water-pipe connected with their existing system of water-supply pipes for the purpose of supplying customers in that area.

The plaintiffs claimed an injunction to restrain the defendants from constructing waterworks within the plaintiffs' limits of supply without their consent, so long as the plaintiffs were able and willing to supply water proper and sufficient for all reasonable purposes.

The order of the county council for rectification of boundaries, as altered and confirmed by the Local Government Board, provided that, "on and after the appointed day all the rights, liabilities, and obligations which are attaching to the said Mirfield Urban District Council, wholly in respect of the added area, and all property within such area vested in the same district council shall (subject as hereinafter provided) pass to and vest in the Ravensthorpe Urban District Council." That the by-laws and regulations of the Ravensthorpe Council should after the appointed day, and not those of the Mirfield Council, apply to the added district.

Balfour Browne, Q.C., *Swinfen Eady, Q.C.*, and *Alexander Glen*, for the plaintiffs. The term "waterworks," by s. 4 of the Public Health Act, 1875, includes "mains, pipes," "and things for supplying water." The laying down of pipes for bringing water from elsewhere and supplying it within a district is "constructing waterworks" in that district. The defendants are "constructing waterworks" in the recently added district,

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a place within the limits of supply of the plaintiffs—a thing they are prohibited from doing by s. 52 of the Public Health Act, 1875, without having first given notice in writing to the plaintiff corporation. It was held in the case of *Cleveland Water Co.* v. *Redcar Local Board* (1) that the adding very largely to, even multiplying, the existing waterworks of a local authority for the supply of a district already supplied by them, was not constructing waterworks within the meaning of s. 52 of the Public Health Act, 1875; and in *West Surrey Water Co.* v. *Guardians of Chertsey Union* (2) it was held that works to enable a local authority to flush their sewers were not works for supplying water, before constructing which it was necessary to give notice to the water authority. It is consistent with both these cases that a local authority which supplies one part of their district may not set up waterworks in an added district in which there is another water authority able and willing to supply. If the defendants could do what they are attempting to do in the present case, they could do the same thing if the whole of Mirfield or any other part of the plaintiffs' district had been added to theirs.

The effect of the order of the county council rectifying boundaries was to transfer rights and liabilities wholly in respect of the transferred area from the Mirfield Council to the Ravensthorpe Council. The Mirfield Council could not before the transfer have constructed the proposed works without giving notice to the plaintiff corporation: that disability was taken over by the defendant council with the added area.

Vernon Smith, Q.C., and *R. Cunningham Glen*, for the defendant council. By the Huddersfield Water Act, 1871, "the parish of Mirfield" was placed within the limits of water supply of the Huddersfield Corporation; the parish then included the district of Ravensthorpe. The effect of the Local Government Act, 1894, was to constitute the Ravensthorpe district into a separate civil parish, and take it out of the limits of water supply of the plaintiff corporation. When the boundaries were subsequently rectified, the disputed area was transferred to the Ravensthorpe district, and became part of Ravensthorpe parish,

(1) [1895] 1 Ch. 168. (2) [1894] 3 Ch. 513.

and therefore was taken out of the plaintiffs' limits of water supply; for this reason the defendants were not obliged to consider the plaintiffs in the matter.

If we are wrong on that point, we say that the defendants are not "constructing waterworks"; what they are doing does not come within what is authorized by sub-s. 1 of s. 51 of the Public Health Act, 1875, but within what is authorized by sub-s. 2 or sub-s. 3; and the restrictions on "constructing waterworks" contained in s. 52 of the Act only apply to sub-s. 1 of the previous section.

In the third place, if the laying of pipes for the first time in a district can be said to be "constructing waterworks" within the meaning of s. 52, the defendants are merely making an addition to their existing waterworks—an operation that is not within the scope of s. 52: *Cleveland Water Co.* v. *Redcar Local Board*. (1)

The added district has become an integral part of the district of the defendant council, in respect of which their rights and duties are the same.

Balfour Browne, Q.C., in reply. The description of the limits of supply of the plaintiff corporation contained in their water Act of 1871 relates to geographical areas: they are the same as if the areas had been delineated on a map, and the alteration of boundaries for purposes other than water supply does not affect those descriptions.

March 2. NORTH J. (after stating the facts):—Now the meaning of the Act fixing the limits of supply I understand to be really this. It is not for the purpose of giving the water authority an exclusive monopoly of any kind within the district, but it is saying within what district their powers under the Waterworks Act may be exercised. Outside their district, to do anything such as the Act prescribes is ultra vires. Within the limits of the circumscribed district they have the powers to do whatever the Act requires or authorizes to be done. It seems to me, then, the definition in that schedule of "the township of Mirfield, in the parish of Mirfield," includes within the limits

(1) [1895] 1 Ch. 168.

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of water supply the particular local area then described by that name. Of course, it was very well known at that time, and it seems to me to be a local description defining an area. It is not to be read, unless there is something else to give it this meaning, as meaning such lands as may for the time being be within the township of Mirfield, but it means that the township of Mirfield as it at present exists is a place over which the powers may be exercised, and the company may do whatever is authorized by the Acts for carrying a supply of water by mains or otherwise through the district so defined. [His Lordship read the material part of s. 57 of the Local Government Act, 1888, and continued :—]

In the year 1894 the Act commonly known as the Parish Councils Act was passed, and that provides for the division of parishes supplemental to the provisions for the division and alteration of local government areas in s. 57 of the 1888 Act. Under that Act an order was made by the West Riding Boundaries Committee, a body which had authority in the matter, by which the parish of Mirfield, which had previously to the passing of the Act included Ravensthorpe, was divided. The name "Ravensthorpe" as the parish name was given to the Ravensthorpe urban district, and the name "Mirfield" as the parish name was retained for the Mirfield urban district. It was contended for the defendants that this had the effect of altering the area of water supply of the Huddersfield Corporation, so as to make it different from that prescribed by the 2nd schedule to the Act of 1871, which I have read.

In my opinion, it had not any such effect. I think that the area of the plaintiffs, as defined by the schedule of the Act of 1871, remained immediately after the division of the parish took place exactly as it was before. In my opinion, the division of the parish had nothing whatever to do with the defined local area of the water supply, and had no effect in altering it. The section provides for not merely the dividing one parish into two, but the union of two parishes into one, and it might be that, instead of allowing the parish of Mirfield to be sub-divided, the board might have joined the parish of Mirfield to some other parish, let me say the parish of Dewsbury, and have

given the name of Dewsbury to the united parish. The parish name then of Mirfield would have disappeared altogether; but it would be absurd to suppose that any such alteration as that could possibly be intended to alter the limits of water supply of the Huddersfield Corporation under an earlier Act. [His Lordship read the material parts of the order of the West Riding County Council of March 13, 1895, rectifying boundaries, and continued:—]

Down to that time the Ravensthorpe Urban District Council, represented by the present defendants, had all the rights of the local authority for the Ravensthorpe district. The adjoining body, the Mirfield Urban District Council, had exactly the same rights over the Mirfield district. The effect of this order was to transfer and add to the Ravensthorpe district the small plot of about twenty acres which down to that time had been part of the Mirfield district, and to put what is called the added area—this twenty acres—entirely into the Ravensthorpe district instead of the other. That being so, the defendants are the local authority for the district as it now stands, and their duties with respect to that district apply to the whole of it, the newly added part as well as the old part. The addition made was only a very small portion of the district. The district before was very nearly 360 acres; the added portion in question was twenty acres, being about one-nineteenth of the united area.

Then the defendants have, as I said, exactly the same duties as to every part of their district—as to the new part as to the old—and for that purpose have proceeded to extend their system of water supply into the small piece thus added; and they either have laid, or are about to lay down, an additional main something like 180 or 200 yards long, in order to supply the water to this added area. The plaintiffs, who are the Huddersfield Corporation suing as the water authority of a large district, object, and say that the defendants cannot lawfully act as they intend to do. Under the 51st section of the Public Health Act the urban council "may provide their district"—and that means, of course, every part of their district—"with a supply of water proper and sufficient for public and private purposes." Then the plaintiffs refer to the 52nd section, and say that shews that

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the defendants cannot do what but for the 52nd section no doubt they might have done. The 52nd section is this: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which and (as far as may be practicable) the extent to which water is required by the local authority." The local authority there is the defendant council. The district is within the limits of supply of the Huddersfield Corporation, and therefore it says that such notice shall be given. [His Lordship read the rest of s. 52 of the Public Health Act, and proceeded:—]

The question is, then, whether the defendants are precluded from extending their mains into the added area without giving notice to the plaintiffs in pursuance of the terms of that section. The question seems to me really to be covered by authority. The case of *Cleveland Water Co.* v. *Redcar Local Board* (1) seems to me to be precisely in point. In that case the Cleveland Water Company had power to supply, as part of their limit of supply, the Redcar urban district. The Redcar local authority also, under the 51st section of the Act, supplied water for that district, and they had, long before this Act was passed, constructed waterworks for the purpose. In 1883 they had enlarged their works by constructing a reservoir containing 450,000 gallons, and by laying further pipes in connection with it. They again added to that in 1886; and then in 1889 the company was incorporated under a special Act by which they obtained the power of supplying water to a large area which included Redcar; but they had not up to that time supplied Redcar with water, although they were in a position to do so. The defendant board were proposing to construct an additional reservoir, to be connected with the existing system, capable of containing 6,000,000 gallons, for which purpose they were going to acquire additional land from Lord Zetland and a fresh source of water supply. And it was pointed out what their reasons were

(1) [1895] 1 Ch. 168.

for requiring an increase of supply. It was contended by the plaintiffs in that action that the 52nd section prevented the Redcar Board from doing so without first giving notice to the plaintiffs and giving them the option of supplying the water that was necessary. On the other hand, it was pointed out that there were existing waterworks there which were capable of supplying water to the district, and to do it effectually they required to extend their works. The question raised was whether the making of this large new reservoir, more than doubling their works (as I understand the judgment of Chitty J.), was constructing waterworks which required a notice to be given to the plaintiff company, who could furnish a supply, before those waterworks were constructed. The judgment in that case was read through to me, and I might read as part of my judgment what I find at pages 173 to 175 ([1895] 1 Ch.). I do not think it necessary to read it through again, but it does precisely cover the ground here. It draws the distinction between new waterworks and an extension of existing waterworks. It was pointed out that what was done in that case, which was much more than is proposed to be done here, was not the construction of waterworks, but the extension of existing waterworks; and the extension of existing waterworks is not a construction of waterworks within the meaning of the 52nd section of the Public Health Act. That case seems to me to be on all fours with the present, and it settles the matter.

I may observe, with respect to the 51st section, that an authority is authorized to first construct and maintain waterworks and dig wells, and do any other necessary acts. That is the first thing. Secondly, to take on lease or, with the leave of the Local Government Board, purchase waterworks; and, thirdly, contract with any person for a supply of water. Then, when the 52nd section takes up the question of constructing waterworks, I am not at all satisfied that that construction of waterworks applies to more than the 1st sub-section of the 51st section. The 1st sub-section relates to constructing waterworks. The 2nd and 3rd sub-sections provide for something else. But I do not think it necessary to go into the question

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here, because I am willing to assume, for the purpose of my judgment, that the extension of the main might possibly be a construction of new waterworks. But then it comes to this: that the defendants have had a system of pipes extending through their district for thirty years past, and no doubt what they are doing is extending the main a little bit further. I do not think it material for the present purpose to say whether that system of existing pipes can be called waterworks or not, because whether it is or is not so called it seems to me the result is the same. Supposing that the defendants' existing system cannot be called waterworks, of course an extension of their main a little further cannot be to make waterworks either. If, on the other hand, the present system of distribution of water belonging to the defendants is what may be called existing waterworks, then to carry the main a little further is not constructing waterworks, but is extending the existing waterworks. In that case the decision of Chitty J. in *Cleveland Water Co.* v. *Redcar Local Board* (1) is exactly in point. The only distinction drawn between that case and the present was this. It was said that in that case the Redcar district had been all one district from the first, whereas in the present case the Ravensthorpe district is not now its original district, but its original district plus this area recently added. It was not pointed out how that made any difference, and I cannot see how it does. It seems to me utterly immaterial. The duty of the defendants now is addressed to their present district; their powers extend over their present district; and it seems to me as immaterial that it did not formerly include quite as much as it does now as it would be to say that the powers of the Huddersfield Corporation in 1869 did not extend to this area, and that it was only in 1871 that they were added to it.

Then, considering, as I do, that that case is exactly in point so far as we have gone, the only consideration is whether there is any difference made by reason of the terms of the order of the council to which I have already referred. That order was made, as I said, on March 13. Then no petition was presented against it, and the Local Government Board therefore proceeded

(1) [1895] 1 Ch. 168.

to confirm it, subject to certain modifications immaterial to this action.

Then the question is as to this provision, "that on and after the appointed day all the rights, liabilities, and obligations attaching to the Mirfield Urban District Council, in respect of the added area, shall pass to and vest in the Ravensthorpe Urban District Council." It is said, therefore, that the disabilities of the Mirfield Council passed to the Ravensthorpe Council; but I do not see in what way the Mirfield Council were under any liability and obligation to take their water from the Huddersfield Corporation; and, if they were not, no obligation passed to the Ravensthorpe Council to do so. But supposing it could be said that immediately before the transfer the Mirfield Union were under a liability and obligation not to construct any waterworks without giving notice to the Huddersfield Corporation—suppose that that is a liability which passed, and that the Ravensthorpe Council cannot do so any more than the Mirfield Council can do so without giving such notice—then the old point that I dealt with comes up again: they are not constructing waterworks; what they are doing is merely extending the existing waterworks, which is not a construction of waterworks within the 52nd section.

It was said on behalf of the plaintiffs that if the construction I have put upon the Act is right, they may have a poaching upon their area by the defendants to an extent which would take away something like 4000*l.* a year from them. That can only be so if the boundary of the defendants' district was extended to the prejudice of and by taking away from the plaintiffs' district. I do not think that is very likely to happen, because the boundaries have been adjusted, and it is not likely that there will be occasion to adjust them again; and in the next place the plaintiffs have the advantage of being in possession: that always gives them an advantage over persons who are merely coming into a district where they have not been before. But whether it is so or not, I cannot help it; if that is the effect of the law—that the plaintiffs may be interfered with by the defendants by reason of some alteration of

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boundaries hereafter,—I cannot help it; it does not affect the case.

Under these circumstances, it seems to me that the plaintiffs have mistaken their rights, and that they are not entitled to the order they ask for.

The motion, therefore, must be dismissed.

Solicitors for plaintiffs: *Riddell, Vaizey & Smith, for F. C. Lloyd, Huddersfield.*

Solicitors for defendants: *Jaques & Co., for Watts & Son, Dewsbury.*

D. P.

BELL *v.* BALLS.

STIRLING J.

1897

Feb. 11, 12; *March* 10.

[1895 B. 5225.]

Principal and Agent—Sale by Auction of Real Estate—Implied Agency of Auctioneer—Memorandum of Contract—Signature by Auctioneer's Clerk on behalf of Purchaser—Revocation—Statute of Frauds.

The authority of an auctioneer, upon a sale by auction of real estate, to sign a memorandum of the contract as agent for the purchaser does not extend to the auctioneer's clerk. Such a memorandum, in order to bind the purchaser, must be signed by the auctioneer himself and at the time of the sale, unless the purchaser has, by word, sign, or otherwise, authorized the clerk to sign as his agent.

Where the auctioneer had signed a memorandum as agent for the purchaser a week after the sale, and the purchaser had repudiated the purchase at the time:—

Held, that the auctioneer's authority had ceased, and that there was no memorandum in writing sufficient to satisfy the requirements of the Statute of Frauds.

THIS was an action by the plaintiffs as vendors of certain freehold property known as "The Riddings," No. 73, Tulse Hill, for specific performance of an alleged agreement by the defendant to purchase the same. The plaintiffs caused the property in question to be put up for sale by auction by Messrs. Herring, Son & Daw, a firm of auctioneers, at the Mart, Tokenhouse Yard, on November 25, 1895, upon the terms expressed in printed particulars and conditions of sale, at the end of which was a memorandum of agreement in blank. The defendant, in company with a friend named Wyatt, attended the sale. Upon Mr. Daw, a member of the firm of auctioneers, entering the room a short conversation took place with reference to "The Riddings" between him and the defendant, who was known to him personally, and just before he entered the rostrum he asked the defendant to "give him a bid." The sale was then begun of five different properties, among which "The Riddings" came third. The reserve price was 1600*l.* The defendant bid 1550*l.*, and, after communications had passed between Mr. Daw and the vendors, the property was knocked down to the defendant at that price. The sale of the two

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remaining properties was then proceeded with, and at the close the defendant left the room. Upon the auctioneer's clerk calling Mr. Daw's attention to the circumstance that the defendant had not signed the memorandum of agreement, a messenger was sent after him, and he returned. He was then asked to sign the memorandum, but refused, on the ground that he had made the bid for Mr. Daw in compliance with his request, and not for himself. The auctioneer's clerk had in the meantime filled up the memorandum of agreement on a copy of the printed particulars and conditions of sale in the appropriate manner. The memorandum, as filled up, ran as follows:—

"I, George Balls, of Brixton Hill, S.W., do hereby acknowledge that I have this day purchased the property described in the within particulars of sale for the sum of one thousand five hundred and fifty pounds, and having paid into the hands of Messrs. Herring, Son & Daw, the auctioneers, the sum of one hundred and fifty-five pounds as a deposit, and in part payment of the purchase-money, I hereby agree and bind myself, my heirs, executors, administrators, and assigns, to pay the balance of the said purchase-money, and complete the said purchase in all respects according to the within conditions of sale. As witness my hand this 25th day of November, 1895."

Then followed a recapitulation in figures of the amount of the purchase-money, the deposit and balance owing, and the document concluded with these words: "As agents for the vendors, Peter Bell and William Dickson, we hereby ratify this sale, and as auctioneers acknowledge to have received the deposit. Abstract to be sent to ——." This memorandum was not signed either by the defendant, the auctioneer, or his clerk. A week later, however, on December 2, 1895, Mr. Daw, at the instance of the vendors, filled up and signed, in the name of his firm, and as agent for the defendant, another copy of the memorandum, striking out, however, all reference to the deposit which the defendant had not paid. The defendant persisted in his refusal to complete the purchase, and the action was brought to compel him to do so, the plaintiffs relying upon both the above-mentioned documents as memoranda of the

contract sufficient to satisfy the requirements of the Statute of Frauds.

Grosvenor Woods, *Q.C.*, and *Ingpen*, for the plaintiffs. (1.) Where an auctioneer's clerk is visibly employed in the auction-room in taking down the names of the purchasers and the amounts of the purchase-money, he is as much the agent of the purchaser as the auctioneer himself, and the purchaser must be presumed to have assented to his employment. The general rule expressed in the maxim "Delegatus non potest delegare" is subject to exceptions where the nature of the particular business requires it. There is no authority precisely in point, but the question has been discussed in several cases: *Bird* v. *Boulter* (1); *Peirce* v. *Corf* (2); *M'Mullen* v. *Helberg* (3); *Dyas* v. *Stafford* (4); Sugden on Vendors and Purchasers, 14th ed. p. 147; *De Bussche* v. *Alt* (5); *Sims* v. *Landray* (6); Fry on Specific Performance, § 531.

(2.) Assuming that the memorandum signed by the clerk does not bind the purchaser, the later memorandum signed by the auctioneer himself binds him. It may be said that the purchaser had in the interval revoked the authority, and we do not dispute that the auctioneer could perform no new act after the sale so as to bind the purchaser to any other contract than that entered into at the fall of the hammer; but why should he not bind him to a document which is a mere record of the contract? After the property has been knocked down it is too late for the purchaser to revoke his authority: Dart on Vendors and Purchasers, 6th ed. vol. i. p. 209; *Day* v. *Wells*. (7) That was a case of a vendor; but for the present purpose there is no difference between a vendor and a purchaser.

(3.) The defendant is not entitled to relief on the ground of mistake. If the defendant was deceived, he deceived himself: *Tamplin* v. *James*. (8)

Hastings, *Q.C.*, and *Stallard*, for the defendant. The question is whether the auctioneer's clerk can be regarded as the agent of the purchaser except under special circumstances.

(1) (1833) 4 B. & Ad. 443.
(2) (1874) L. R. 9 Q. B. 210, 215.
(3) (1879) 4 L. R. Ir. 94, 105.
(4) (1881) 7 L. R. Ir. 590, 600.
(5) (1878) 8 Ch. D. 286, 310.
(6) [1894] 2 Ch. 318.
(7) (1861) 30 Beav. 220.
(8) (1880) 15 Ch. D. 215.

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It is said that the memorandum written out by the clerk is binding on the defendant, whose agent he is for that purpose. There is no foundation for that contention except in a case where the purchaser has in some way or other specially authorized the clerk to act as his agent.

In *Sims* v. *Landray* (1) there was evidence that the purchaser stood by and assented to the clerk's writing the memorandum; and the decision turned expressly on the authorization of the clerk by the purchaser.

As to the earlier authorities, what was said by Hullock B. in *Henderson* v. *Barnewall* (2) can only be regarded as a dictum, and was so referred to in *Bird* v. *Boulter*. (3) That case is no authority for the proposition that the clerk is by implication the agent of the purchaser just as much as the auctioneer himself is. It was there contended that *Farebrother* v. *Simmons* (4) was not well decided, but the Court held that it was not necessary to interfere with that case, inasmuch as they came to the conclusion that the purchaser had there expressly authorized the clerk to sign the memorandum for him as his agent.

In *Peirce* v. *Corf* (5) it was distinctly laid down that whereas there is a custom in sales by auction for the auctioneer to sign on behalf of the purchaser, yet there was no such usage as regards the auctioneer's clerk. *Emmerson* v. *Heelis* (6) shews that the principle is founded on this, that the purchaser by giving the auctioneer his bid thereby constitutes him his agent to sign the memorandum which is the evidence of the contract. But that does not extend to the clerk.

In both the Irish cases there were circumstances of special authority. In *Dyas* v. *Stafford* (7) no doubt there is a statement that *Bird* v. *Boulter* (3) decided that the clerk of an auctioneer is the agent for both vendor and purchaser to enter a minute of the sale, and by his signature to such minute to constitute it a note or memorandum of the agreement within the statute. That is a statement, however, which cannot be

(1) [1894] 2 Ch. 318.
(2) (1827) 1 Y. & J. 387, 389.
(3) 4 B. & Ad. 443.
(4) (1822) 5 B. & Al. 333.
(5) L. R. 9 Q. B. 210, 215.
(6) (1809) 2 Taunt. 38.
(7) 7 L. R. Ir. 590, 600.

supported. All the judges in that case thought there was a special authority given to the clerk.

So far as there is any authority it is against the proposition contended for by the plaintiffs: Fry on Specific Performance, 3rd ed. p. 251, *Coles* v. *Trecothick* (1), and *Bird* v. *Boulter*. (2)

An agent cannot delegate his authority unless there is some exigency that he should do so. There is none here. There is no imperative necessity for the clerk to sign for the purchaser any more than for the vendor. As to the second document signed by the auctioneer, the agency of the auctioneer (if any) ceased at the end of the sale.

[STIRLING J. Would not he have a reasonable time to fill up the document?]

At any rate, the agency cannot be taken to last longer than the day of the sale; but we say that as soon as the parties have left the sale-room the agency is terminated: *Seton* v. *Slade* (3); *Farmer* v. *Robinson* (4); Agnew on the Statute of Frauds, p. 288. *Emmerson* v. *Heelis* (5) shews that, because the whole principle is that the agency is constituted by the tender of the bid. In *Mews* v. *Carr* (6) Pollock C.B. says: "No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only." But even if there was an agency lasting for a longer period it was revoked by the purchaser: Fry on Specific Performance, 3rd ed. p. 252, par. 534.

[STIRLING J. Could the purchaser, the moment after the hammer has fallen, revoke the agency and forbid the auctioneer to sign?]

An implied authority can be revoked at any time: *Manser* v. *Back*. (7)

Further, we say that the contract, if any, was entered into by mistake, and the Court will not enforce it: *Jones* v. *Rimmer*. (8)

(1) (1804) 9 Ves. 234.
(2) 4 B. & Ad. 443.
(3) (1802) 7 Ves. 265.
(4) (1805) 2 Camp. 339, n.
(5) 2 Taunt. 38.
(6) (1856) 1 H. & N. 484, 488.
(7) (1848) 6 Hare, 443.
(8) (1880) 14 Ch. D. 588.

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Grosvenor Woods, Q.C., in reply. The Court cannot give effect to the doctrine of mistake in such a case as this. The position of an auctioneer, if he were liable to such a thing, would be intolerable. As to the parties being ad idem, see *Preston* v. *Luck*. (1) A purchaser by bidding at an auction must be taken to give a binding authority to some one there to sign a memorandum of the contract on his behalf. Why should that be limited to the auctioneer himself, and not extended to the clerk? An auctioneer conducting numerous sales during the day cannot be expected to fill up all the necessary documents with his own hand. At any rate, he cannot be expected to sign them all on the day of the sale. At large auctions the sales sometimes last till late at night. The test is what is reasonable. It would be dangerous to hold that the auctioneer must sign the memorandum before leaving the auction-room.

[STIRLING J. It is not a matter that ought to be put off.]

No; but here the circumstances of the case justify the delay.

The statement as to delegation of agency in Fry on Specific Performance is too wide: Sugden on Vendors and Purchasers, 14th ed. p. 147. When the position of the parties has been materially altered an implied authority cannot be revoked.

[STIRLING J. referred to Story on Agency, 9th ed. p. 580, and to *Farmer* v. *Robinson*. (2)]

I submit that that was not well decided. At any rate, it ought not to be extended to sales by auction.

Cur. adv. vult.

March 10. STIRLING J. (after stating the facts):—The first question is whether the defendant really bid for the property, as he alleges, in the belief that he was bidding for Mr. Daw, or in other words acting as puffer at the sale. The story is a strange one; but I am bound to say that, having seen the defendant in the box and heard his evidence and that of his friend, Mr. Wyatt, and seen the memoranda which he produced, I believe that he did act under the belief which he professes. On the other hand, I think that the defendant had

(1) (1884) 27 Ch. D. 497. (2) 2 Camp. 339, n.

no reasonable ground for so acting; and that what passed between him and Mr. Daw, as told by himself, ought not to have misled him into the belief which he entertained. Under these circumstances, what is the legal result? It seems to me that, assuming a memorandum to exist which satisfies the requirements of the Statute of Frauds, there is a contract between the plaintiffs and defendant which is enforceable at law, and that the mistake at most constitutes a defence only so far as the action seeks specific performance; and, as was laid down by the Court of Appeal in *Tamplin* v. *James* (1), the Court is now bound in such a case to consider the question of damages. The validity of the second defence must therefore be considered.

First, with reference to the memorandum filled up by the auctioneer's clerk. It has been decided that upon a sale by auction the auctioneer is the agent of the purchaser as well as of the seller, and has authority to sign a memorandum of the sale so as to bind both parties; and if the memorandum on a copy of the particulars had been filled up by the auctioneer with his own hand in the same way as the memorandum now in question was filled up by the clerk, it would have been sufficient. An agent, however, cannot as a rule delegate his authority. The law as to that in the case of an auctioneer and his clerk is laid down in *Peirce* v. *Corf* (2), where Blackburn J. said: "I take it as quite clear that the auctioneer's clerk has no authority to sign by the general custom; although, as *Bird* v. *Boulter* (3) decided, there may be special circumstances to shew that an auctioneer's clerk had authority to sign; where the bidder, that is, the person to be charged, by word or sign authorizes the auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent." In the present case the defendant did not by word, sign, or otherwise authorize the auctioneer's clerk to sign on his behalf, and the case of *Bird* v. *Boulter* (3) has no application. It was, however, urged that the exigencies of the case require that on sales by auction at

(1) 15 Ch. D. 215. (2) L. R. 9 Q. B. 214.
(3) 4 B. & Ad. 443.

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the present day the auctioneer's clerk sitting publicly beside him should be held authorized to sign memoranda on behalf of purchasers. The ordinary practice at the present time with reference to sales of real estate was stated by Mr. Daw, the plaintiffs' own witness, to be that an auctioneer, after he has knocked down a particular lot, proceeds with the sale of the following lots and leaves it to the clerk to find out the name of the purchaser and to prepare a record of the contract, which he does by filling up the memoranda appended to two copies of the particulars of sale, one for signature by the purchaser, the other for signature by the auctioneer. Some convenience, no doubt, attends such a practice, and I do not desire to question its validity, but the mere statement of it appears to me to shew that there is no ground for the contention that the exigencies of the case require that the auctioneer should be held entitled to delegate his authority to his clerk. The practice contemplates that one part of the memorandum should be signed by the auctioneer; and if this be consistent with the requirements of business, why should not the signature of the other by him be also? I say this quite irrespective of what was urged in argument that there is no difficulty in the auctioneer writing down at the time the name of the purchaser on a copy of the particulars and conditions of sale, which was held to be sufficient in *White* v. *Proctor* (1) and *Kemeys* v. *Proctor*. (2) I come, therefore, to the conclusion that the memorandum filled in by the clerk does not satisfy the requirements of the Statute of Frauds.

Secondly, as to the memorandum signed by the auctioneer on December 2, 1895. It was contended that at the time when the auctioneer signed it he had no authority so to do—first, because the authority conferred by the purchaser on the auctioneer at the time of the sale had expired long before December 2, 1895, or, at all events, could not be exercised at that date; and, secondly, because the purchaser had actually revoked the authority.

The first decision that, on a sale by auction of an interest in

(1) (1811) 4 Taunt. 209.
(2) (1813) 3 V. & B. 57; (1820) 1 Jac. & W. 350.

land the auctioneer is authorized by the purchaser to sign a memorandum of the contract, is *Emmerson* v. *Heelis*. (1) There the auctioneer signed by entering the purchaser's name opposite a particular lot in a specially prepared catalogue. Mansfield C.J. says: "This memorandum is more particular than most memorandums of sale are; and upon it the auctioneer writes down the purchaser's name. By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings, loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser." In *Earl of Glengal* v. *Barnard* (2) Lord Langdale M.R. (3) thus explains the ground of his decision: "The nature of the proceeding by auction—the bidding for the purpose of making the purchase—the necessity of making a statement of the bidding—the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances afford intelligible ground for the decision in *Emmerson* v. *Heelis* (1) and the approbation which has since been bestowed upon it." These cases appear to shew that the authority which the purchaser confers upon the auctioneer is to write down the bidding—that is, to make a minute or record of it at the time and as part of the transaction, and such a record is held a memorandum sufficient to satisfy the statute. I do not see that the nature of the proceeding justifies the implication of an authority to make a memorandum, except at a time when the writing down can fairly be held to be a part of the sale. If the auctioneer were allowed to record the bidding at a later time evils might arise similar to those which the Statute of Frauds was intended to prevent.

Such authority as there is appears to me to favour this view. I am not sure how far the case of *Mews* v. *Carr* (4) can really be so regarded, for though the learned judges speak of the

(1) 2 Taunt. 38, 47.
(2) (1836) 1 Keen, 769.
(3) 1 Keen, 788.
(4) 1 H. & N. 484.

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auctioneer ceasing to be agent for the purchaser "so soon as the sale is over," their remarks were directed to the case of a sale made through the auctioneer not at the auction but several days afterwards. The point, however, was raised in *Buckmaster* v. *Harrop*. (1) There the auctioneer was one of the vendors, and apparently did not make his entry of the bidding at the time of the sale, and objection was taken on that account. Lord Erskine L.C. thus deals with it: "The only evidence, that I can receive, is the written memorandum itself, unless it is lost; and it must be a cotemporary memorandum, especially in this case: as the auctioneer, being himself the vendor, though only as a trustee, could not in strictness be the agent of the purchaser." By a cotemporary memorandum I understand one made at the time and as part of the transaction of sale. If in the present case the auctioneer had proceeded to sign a memorandum immediately on the conclusion of the auction I should have been slow to hold that to be beyond his power; but I think that the memorandum of December 2, 1895, was signed at a time when the auctioneer's authority had ceased. It becomes unnecessary, therefore, to consider the question whether the purchaser could revoke the authority conferred by him on the auctioneer. I content myself with saying that I share with Lord Romilly his reluctance to hold that upon a sale by auction under ordinary circumstances the vendor or the purchaser can say after a lot has been knocked down, "I am not satisfied with the price and withdraw the authority given to the auctioneer": see *Day* v. *Wells*. (2) The result, therefore, is that the action fails, and must be dismissed with costs.

Solicitors: *Beaumont, Son & Rigden; Charles Butcher.*

(1) (1807) 13 Ves. 456, 473. (2) 30 Beav. 220.

G. A. S.

In re BENTINCK. BENTINCK *v.* BENTINCK.

[1891 B. 1832.]

STIRLING J.
1897
March 13, 17.

Administration of Assets—Insolvent Estate—Specialty and Simple Contract Debts—Crown Debt—Priority—Hinde Palmer's Act (32 & 33 *Vict. c.* 46).

A testator died insolvent after 1870 owing specialty and simple contract debts, including a simple contract debt to the Crown. The assets were more than sufficient for payment of the Crown debt after satisfying the specialty debts :—

Held, having regard to 32 & 33 Vict. c. 46, that the assets ought first to be apportioned rateably between the specialty and simple contract debts, and that the Crown debt ought then to be taken out of the amount apportioned to the simple contract debts.

The principle of *Wilson* v. *Coxwell*, (1883) 23 Ch. D. 764; *In re Jones*, (1885) 31 Ch. D. 440, and *In re Briggs*, W. N. (1894) 162, applied.

In re Williams' Estate, (1872) L. R. 15 Eq. 270, distinguished.

In 1891 the testator in the action died insolvent, and this action was brought for the administration of his estate. The particulars of the several classes of claims against the estate of the deceased were as follows :—

Simple contract debts, 253,039*l.* 12*s.* 10*d.*

Specialty debts, 17,980*l.* 7*s.* 3*d.*

Crown claims for unpaid probate and residuary estate duty under the will of Lord Henry Bentinck, of which the deceased was the sole proving executor and residuary legatee, 3733*l.* 16*s.*

These claims were made up as follows :—

Additional probate duty (payable under 55 Geo. 3, c. 184), 1500*l.*; residuary estate duty (payable under 36 Geo. 3, c. 52), 2233*l.* 16*s.*

The assets of the deceased were, approximately, 114,000*l.*

The claims of the Crown were paid out of the estate of the deceased (before any of the other claims were satisfied) under an order of the Court made in the action dated April 29, 1895.

A summons was now taken out in the action by two specialty creditors of the deceased to have it determined how, as between

STIRLING J. the specialty and simple contract creditors, these payments were to be borne. This question turned upon the provisions of Hinde Palmer's Act (32 & 33 Vict. c. 46), which is intituled "An Act to abolish the distinction as to priority of payment which now exists between the specialty and simple contract debts of deceased persons." At the hearing of the summons it was conceded that the additional probate duty could not be regarded as a debt due from the deceased, and that the payment of the 1500*l.* ought to be treated as a preferential payment properly made by leave of the Court for the benefit of the estate. The application was therefore confined to the sum of 2233*l.* 16*s.* paid for the residuary estate duty.

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Hastings, Q.C., and *Davenport*, for the summons. The effect of 36 Geo. 3, c. 52, s. 6, is to make the Crown a simple contract creditor in respect of this residuary estate duty. Apart from Hinde Palmer's Act, the Crown would be entitled to priority over other simple contract creditors, but not over specialty creditors, and the Crown is not affected by that Act because not specially mentioned therein: *In re Henley & Co.* (1) There being assets sufficient to pay this Crown debt in full after satisfying the specialty creditors, the proper course, having regard to Hinde Palmer's Act, is to apportion the assets rateably between the specialty and simple contract creditors, and then take the Crown debt out of the amount apportioned to the simple contract creditors. That is the course which has been adopted in several cases where an executor has claimed to exercise his right of retainer in respect of a simple contract debt: *Wilson* v. *Coxwell* (2); *In re Jones* (3); *In re Briggs.* (4) The executor, like the Crown, gets his priority by reason of his peculiar position, and the right of retainer is in substance a right to preferential payment. The analogy, therefore, between the two cases is complete. It is said that the result is to give the specialty creditors a priority over the simple contract creditors, and that that is inconsistent with the object of the statute. But it is a fallacy to say that the statute abolishes the distinc-

(1) (1878) 9 Ch. D. 469.
(2) 23 Ch. D. 764.
(3) 31 Ch. D. 440.
(4) W. N. (1894) 162.

tion between specialty and simple contract debts. The statute merely says that no debt of a deceased person shall be entitled to priority of payment by reason of its being a specialty debt. But here the statute is obeyed before the priority comes in, and the accidental priority accruing to the specialty creditors arises from the peculiar position of the Crown.

Buckley, Q.C., and *T. T. Method*, for simple contract creditors. By Hinde Palmer's Act, for the purposes of payment, the distinction between specialty and simple contract creditors is abolished. The statute depresses the specialty creditor to the level of the simple contract creditor. The effect of that is to give the Crown priority over the specialty creditors, and, therefore, the Crown debt ought first to be deducted and the balance divided rateably between the two classes of creditors. This case is analogous to *In re Williams' Estate* (1), where a simple contract creditor of a deceased person obtained judgment against the personal representative of the deceased, the effect of which was, apart from the statute, to give him priority over the other creditors of the deceased of the same degree, and it was held that the indirect result of the statute was to give him priority over the specialty creditors.

Further, the effect of the Intestates Estate Act, 1884 (47 & 48 Vict. c. 71), s. 3, is to take away the priority of the Crown. Notwithstanding the title of that Act, s. 3 applies to all estates of deceased persons.

[STIRLING J. I do not think that that section was intended to take away the priority of the Crown.]

Cunliffe, for the executors.

Hastings, Q.C., in reply. *In re Williams' Estate* (1) is distinguished by Kay J. in *In re Jones* (2), and it is based upon a mistaken view of the Act.

Cur. adv. vult.

March 17. STIRLING J., after stating the facts and referring to Hinde Palmer's Act, continued :—The question is, How is the payment of the Crown debt to be borne as between the specialty and simple contract creditors of the deceased, regard being had

(1) L. R. 15 Eq. 270. (2) 31 Ch. D. 440.

STIRLING J. to the provisions of the statute? The precise point has not as yet arisen for determination, but decisions have been given in two classes of cases, each of which bears a resemblance to the present. The first is that of a simple contract creditor, who, after the death of the debtor, recovers judgment against his legal personal representative. By so doing the creditor did not, before the Act, place himself in the position of a judgment creditor of the testator, and he gained no priority as against specialty creditors; but it was held that he was entitled as a reward of his diligence to be paid in priority to simple contract creditors who had not obtained judgment: see *Ashley* v. *Pocock* (1) and *Dollond* v. *Johnson*. (2) In *In re Williams' Estate* (3) the question arose how the position of such judgment creditor was affected by the statute of 1869; and it was held by Wickens V.-C. that he was entitled to be paid in priority to both specialty and simple contract creditors. [His Lordship read the judgment of the Vice-Chancellor, and continued as follows:—]

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That case, so far as I know, stands alone. The other class of cases relates to the right of retainer on the part of a legal personal representative in respect of a debt due to him from the deceased—a right which can only be exercised in preference to creditors of equal degree. With reference to this right it has been decided in three cases, namely, *Wilson* v. *Coxwell* (4), *In re Jones* (5), and *In re Briggs* (6), that the assets must in the first place be divided rateably between specialty and simple contract creditors, and that effect is to be given to the right of retainer in respect of a simple contract debt due to the legal personal representative only out of the portion coming to the simple contract creditors. The grounds for that decision are thus stated by Kay J. in *In re Jones* (7): "At first sight the decision in *In re Williams' Estate* (3) seems to be analogous to the present case, but upon examination there is a considerable distinction. The judgment creditor was no longer a simple

(1) (1744) 3 Atk. 208.
(2) (1854) 2 Sm. & Giff. 301.
(3) L. R. 15 Eq. 270.
(4) 23 Ch. D. 764.
(5) 31 Ch. D. 440.
(6) W. N. (1894) 162.
(7) 31 Ch. D. 446.

contract creditor, but had attained a higher rank than simple contract creditors in the distribution of assets, and the effect of placing specialty creditors for the purpose of distribution on the same level was necessarily to put them after the judgment creditor. But here the executrix who desires to retain is only a simple contract creditor, and the law that she cannot retain against specialty creditors remains unless the statute must be read that for this purpose, among others, the specialty creditors are of equal degree with the simple contract creditors. The object of the statute was only to take away the priority of a specialty creditor over simple contract creditors, not to give any of them priority over him. Equality between them in case of distribution is the declared purpose." Then, later on, he says: "The right of retainer, as it produces inequality, is never assisted: *Hopton* v. *Dryden* (1); and I do not think that a statute, the object of which is to effect equality of distribution, should be construed to give incidentally the power to defeat specialty as well as simple contract creditors." I understand the case of *In re Williams' Estate* (2) to be there distinguished, because after the death of the testator the creditor had recovered judgment, and had thus attained a higher rank than he held at the time of the death. It is also distinctly laid down by Kay J. that the object of the statute is "only to take away the priority of a specialty creditor over simple contract creditors, not to give any of them priority over him." I am not sure that Wickens V.-C. took the same view.

In that state of the authorities I have to say which of them ought to govern the present case; and, in my judgment, I ought to follow those which relate to the right of retainer. In the first place the creditor now in question has obtained no judgment, and nothing has happened to affect the rank of the debt as it stood at the testator's death, and the position of the Crown resembles more closely that of an executor seeking to retain his debt than that of a simple contract creditor who has recovered judgment against the legal personal representative. In the second place, if there be any difference in the views entertained

(1) (1701) Prec. in Ch. 179; 2 Eq. Ca. Ab. 450.
(2) L. R. 15 Eq. 270.

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by different judges as to the object of the statute, that expressed by Kay J. appears to be that which is in itself preferable, and also that which is supported by the greater weight of authority. The order will be according to the form in *In re Briggs*. (1)

Solicitors: *Cunliffes & Davenport; R. S. Taylor, Son & Humbert.*

H. B. H.

STIRLING J. 1897 *March* 6, 20.

LEWIS *v.* POWELL.

[1896 L. 1195.]

Practice—Discovery—Production of Documents—"Possession or Power"—Solicitor's Lien—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 12.

It is not an answer to an application for production of documents that they are in the hands of the respondent's former solicitors who claim a lien over them for costs and that he disputes the bill; but the order for production will contain liberty to apply in case he really cannot obtain the documents.

ADJOURNED SUMMONS.

On January 1, 1897, the plaintiff filed an affidavit of documents, in which, referring to certain documents set out in the second schedule thereto, he deposed as follows: "The last-mentioned documents were I verily believe in my possession or power in or about the month of May 1896 when I changed my solicitors from Messrs. Russell Cooke & Co. to my present solicitors Messrs. Hanbury, Whitting & Nicholson. I verily believe the said documents or most of them are now in the possession or power of the said Messrs. Russell Cooke & Co. who hold them subject to their lien for their bill of costs against me."

On January 26 the defendant took out this summons against the plaintiff for a further and better affidavit as to the documents contained in the second schedule, and for the production of such of the documents as should appear from such further and better affidavit to be in the possession or power of the plaintiff or of his late solicitors.

(1) W. N. (1894) 162.

On February 15 this summons was ordered to stand over to enable the plaintiff to state more fully his grounds for objecting to produce the documents in the second schedule to his affidavit.

Accordingly, on February 26, the plaintiff filed a second affidavit of documents, in which he gave further particulars as to the documents in question and as to the circumstances relating to the employment and discharge of his late solicitors. From this affidavit it appeared that Messrs. Hanbury, Whitting & Co. had both by letter and verbally requested Messrs. Russell Cooke & Co. to hand over the documents which they held on the plaintiff's behalf, and that Messrs. Russell Cooke & Co. had declined either to hand over the documents or to allow inspection of them, or to give any information in respect of them until payment of their costs, which amounted to about 160*l.*

The plaintiff then deposed as follows (par. 6): "I am unwilling to discharge the lien of the said Messrs. Russell Cooke & Co. as I verily believe I have a good claim for negligence against them in respect of their conduct of my said business while acting as my solicitors. My claim in an action for negligence could be more easily formulated and dealt with after the hearing of this action."

The summons came on for hearing in chambers on March 1, when it was adjourned to be heard in court as a procedure summons.

Grosvenor Woods, Q.C., and *Lacey Smith*, for the summons. A litigant who is called upon to produce documents cannot excuse himself by saying that the documents are in the hands of his solicitors who claim a lien upon them for their costs, but is bound to pay his solicitor's bill. In such a case the usual order for production is made, but liberty to apply is allowed; and if there is any difficulty in complying with the order, it is for the party against whom the order is made to come to the Court and ask to be relieved from obeying it: *Ex parte Shaw* (1); *Taylor* v. *Rundell* (2); *Rodick* v. *Gandell* (3); *Goodchap* v.

(1) (1821) Jac. 270. (2) (1843) 1 Ph. 222. (3) (1847) 10 Beav. 270.

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Weaving (1); *Liddell* v. *Norton* (2); *Hope* v. *Liddell* (3); *Vale* v. *Oppert* (4); Cordery on Solicitors, 2nd ed. p. 302; Seton on Judgments, 5th ed. vol. i. p. 67. It is true that here the plaintiff thinks that he has some ground of complaint against his solicitors for negligence; but that is not a sufficient reason for declining to make the order.

[STIRLING J. referred to Order XXXI., r. 12.]

Hastings, Q.C., and *E. Ford*, for the plaintiff. The rule as to production has never been extended so far as to require a party called upon to produce papers in the hands of his solicitors to pay a bill to which he swears on oath he has a good answer, and the tendency of modern times is to restrict rather than to extend the rule. Apart from the Conveyancing Act, 1881, a mortgagor is not bound to produce deeds in the hands of his mortgagee, and the only difference that can be suggested between a mortgage and a solicitor's lien for this purpose is that, if the solicitor's lien were held to be a good answer to an application for production, it would give an opening for collusion between the solicitor and the client: see per James L.J. in *Vale* v. *Oppert*. (4) But when once the client and the solicitor are at arm's length the reason for the rule disappears.

Production was refused in *Wroughton* v. *Barclay* (5) and *Kettlewell* v. *Barstow*. (6)

Grosvenor Woods, Q.C., in reply.

STIRLING J., after stating the facts, continued as follows:— In this state of facts, what is the right of the defendant to production of the documents in question? It is admitted that the plaintiff has given full information as regards the documents so far as he now can; but the question is how far the lien of the plaintiff's former solicitors precludes the Court from making an order for discovery in the usual form. That question has been repeatedly before the Courts. The case usually referred to as stating the rule which applies where

(1) (1852) 16 Jur. 586.
(2) (1853) Kay, App. xi.
(3) (1855) 7 D. M. & G. 331.
(4) (1875) L. R. 10 Ch. 340.
(5) (1847) 11 Jur. 274.
(6) (1872) 20 W. R. 621.

documents are held by a solicitor subject to his lien for costs is *Ex parte Shaw* (1), where Lord Eldon says: "Where a motion is made for a party to produce papers in his custody possession or power, the order made is for him to produce them, and if they are in the hands of his solicitor, and he cannot produce them without paying his bill of costs, he must pay it." That statement has been repeatedly cited in subsequent cases without a word of disapproval, and is expressly approved by Turner V.-C. in *Goodchap* v. *Weaving* (2); but questions have arisen from time to time as to how far the Court would go in compelling production of documents in the possession of a former solicitor who insisted upon his lien. One of those cases was *Rodick* v. *Gandell* (3), where the defendants, who became bankrupt after the filing of the bill, put in an answer by which they admitted that there were in the possession of their solicitor two pass-books, but alleged that they had come into his possession before the bankruptcy, and that he had a lien thereon for costs incurred prior to that date, and the plaintiff moved for production of the pass-books. Lord Langdale there said: "The defendants are bound to produce these documents if they can; and if they find a difficulty they must come to the Court to give them an opportunity of taking such proceedings against their solicitor as may be proper to compel the production. I cannot think that the solicitor will oppose any difficulty in allowing an inspection of the documents in his possession; and it is to be observed that the objection to production is now made, not by the solicitor, but by the clients"; and he made the order, but left it open to the defendants to make any application to be relieved if they should be prevented from complying with it. In *Vale* v. *Oppert* (4) a similar question arose. There the defendant, shortly after filing an affidavit as to documents, liquidated his affairs by arrangement. The plaintiff applied for production of the documents; and this was resisted by the defendant on the ground that they were in the possession of his former solicitors who claimed a lien on them. Bacon V.-C. made an order for their production. James L.J., in affirming

(1) Jac. 270, 272.
(2) 16 Jur. 586.
(3) 10 Beav. 270, 272.
(4) L. R. 10 Ch. 340.

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the order, said (1): "If an order for production were refused, we should be enabling defendants to resort to the device of delivering documents to their solicitor, changing him, and then refusing production on the ground that they were unable to pay his bill. That is a device which the Court cannot encourage. The order of the Vice-Chancellor must stand, but the defendant must have liberty to apply if it turns out that he really cannot get the documents produced. He will not, however, be excused on the ground of his making a mere formal application to Messrs. Elmslie & Co., as if he did not care whether he got them or not; he must satisfy the Court that he has done his best to comply with the order: and the plaintiff must not issue an attachment without the leave of the Court."

These cases shew that the mere fact that documents are in possession of a former solicitor who claims a lien upon them is not a sufficient answer to an application in the usual mode for discovery; but the Court takes care in applying the rule that the client shall not be subjected to oppression, and in former times the order for discovery was qualified by reserving liberty to apply, and by imposing a condition that attachment should not be issued without the leave of the Court. The latter portion of the order is, however, not now necessary, because under the Rules of the Supreme Court a writ of attachment cannot be issued in any case without the leave of the Court. If there was nothing more in this case I should have thought that the order ought to be made. But the question which I have to consider is whether the statement in par. 6 of the plaintiff's second affidavit makes any difference. In substance the plaintiff disputes the bill of costs which has been delivered, and says he has a good claim for negligence against the solicitors. Ought that to be allowed as an answer to an ordinary application for production? It is said that in the former cases there was no dispute as to the bill of costs, and no case of negligence made against the solicitors, and that the rule of the Court is based upon the theory that it is desirable to discourage collusion between a solicitor and his client, and has no application

(1) L. R. 10 Ch. 342.

where the solicitor and client are at arm's length. I shall assume that that is the foundation of the rule, as it was in part at least the foundation of the judgment of James L.J. Now I do not desire in the slightest degree to say that I in any way suspect the statements in the plaintiff's affidavit to be unfounded; but I must point out that nothing is more common than for a client who quarrels with his solicitor and leaves him to be dissatisfied with the mode in which the solicitor has conducted his business. If I were to accept that as an answer, it would be resorted to in almost every case where there had been a change of solicitors, and there would be thrown upon the Court the burden of considering whether an action for negligence against the solicitor would be likely to succeed. I decline to entertain any such question. The test in every case is whether the person called upon to make production has done his best to get possession of the documents claimed by his solicitor. The Court has the means of judging that question; it has not the means of judging whether an action for negligence against the solicitor will succeed or not. Therefore, I think that the mere statement by the client that he has a claim of negligence against the solicitor ought not to be accepted as relieving him from his obligation. But I must say that at all times, and particularly at the present time, the Court is desirous that orders for production should not be made an instrument of oppression. Therefore, the Court in making the order for production gives liberty to apply to provide for the contingency of the party called upon to produce the documents finding a difficulty in obtaining them. Of course that will form part of the order in the present case.

I was desirous of ascertaining what view the plaintiff's solicitors took, and I therefore directed the matter to stand over for a fortnight. The plaintiff stated that he was perfectly willing that these documents should be produced if the solicitors were willing to give them up. An application has now been made to the solicitors, and it appears that they simply desire to adhere to their legal position until their lien is discharged. I cannot blame them for taking up that position. It is no part of my duty to say what can be done by the plaintiff to enable

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production to be obtained; but when a client is desirous for his own purposes of getting possession of documents in the hands of his solicitors, it is usually not difficult to come to some arrangement by which a substantial guarantee may be substituted for the somewhat shadowy one of keeping the documents which the solicitors happen to have in their possession. At all events, it does not appear to me to be impossible for the plaintiff to obtain production of the documents in question. I think, therefore, that the order, qualified in the way I have mentioned, ought to go.

Solicitors: *Woodham Smith; Hanbury, Whitting & Nicholson.*

H. B. H.

In re MONTAGU. DERBISHIRE *v.* MONTAGU.

[1896 M. 3488.]

KEKEWICH J.

1897

March 6, 16.

Jurisdiction—Settled Land—Expenditure of Money in Rebuilding—Settled Land Acts.

The Court has no jurisdiction, in cases not amounting to salvage, to spend settled money in pulling down and rebuilding houses on settled land.

Where settled land was vested in trustees upon trust for infants, and it appeared that if the houses on the land, which were old, were pulled down and others erected in their place, the value of the property would be largely increased both for letting and selling, and that there was no money fund available to defray the expense of rebuilding, but it did not appear that the proposed expenditure was necessary by way of salvage, an application by the trustees for leave to raise money by mortgage of the land was refused on the ground of want of jurisdiction.

Conway v. *Fenton*, (1888) 40 Ch. D. 512, considered and distinguished.

The general jurisdiction of the Court touching the expenditure of money on land is not ousted by the Settled Land Acts.

This was an originating summons taken out by Eliza Derbishire, spinster, and Charles Edward Cree as plaintiffs against Philip Montagu and Evelyn Maud Montagu his wife, and Vera Evelyn Mary Montagu and May Catherine Jean Montagu, respectively, infants, as defendants, asking for the determination of the following questions, namely: (1.) Whether in the opinion of the Court it would be for the benefit of the infant defendants, Vera E. M. Montagu and May C. J. Montagu, and any unborn children of the defendant Philip Montagu, that the messuages and premises respectively known as Nos. 82, 83, and 82A, Grosvenor Street, and No. 130, New Bond Street, Middlesex (being part of the property held upon the trusts of an indenture of settlement of December 14, 1872), should be taken down and rebuilt at a cost of not more than 8500*l.*, to be raised by a mortgage of the property held upon the trusts of the said indenture or some part or parts of such property; and (2.) Whether the plaintiffs were at liberty to raise the sum (not exceeding in the aggregate the said sum of 8500*l.*) required for the purpose of such taking down and

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rebuilding by a mortgage of the said property or some part or parts thereof.

Under the indenture of December 14, 1872, the houses above mentioned, which were held under a lease from the Corporation of London, were vested in a trustee in trust for the defendant Philip Montagu for life, and after his decease in trust for his children, as he should by deed or will appoint, and in default of appointment for his children equally, but with power to him to appoint by deed that a yearly sum not exceeding 200*l.* should be paid to any wife of his who should survive him. The trustee or trustees of the deed were empowered to sell the premises, and also to raise money by sale or mortgage thereof, for the purpose of renewal of the lease under which they were held, but not for any other purpose, and there was no power given to the trustee or trustees to purchase real estate.

The plaintiffs were the present trustees of the deed.

The defendant Philip Montagu was married to the defendant Evelyn Maud Montagu in 1878, and had exercised in her favour the power of appointment of the yearly sum of 200*l.* The infant defendants Vera E. M. Montagu and May C. J. Montagu were the only children of the marriage.

The houses were now held by the plaintiffs under a renewed lease from the Corporation of London, dated September 24, 1894, for a term of eighty years from March 25, 1894, at a yearly rent of 42*l.* 14*s.*

In support of the application there was evidence shewing that the houses were situate in the best part of Bond Street, but were old, of a very inferior character, not suited to modern requirements, and out of keeping with the rest of the street, and that it was advisable to take them down and entirely rebuild them. A scheme had been prepared by an architect and surveyor from which it appeared that in all reasonable probability, if a sum of about 8000*l.* was expended in rebuilding, the value of the property, which was estimated at 19,000*l.*, would be increased to 32,000*l.*, and the existing rental of 975*l.* to 2045*l.* or thereabouts. It was stated that the roof of 130, New Bond Street was thoroughly out of repair, but there was no further

evidence tending to shew that the proposed expenditure was necessary for the salvage of the settled property.

There was no money fund available for defraying the proposed expenditure, and the present application was accordingly made to the Court for the purpose of obtaining authority for the plaintiffs to borrow and raise by mortgage of the settled property a sum of 8500*l.* to cover the 8000*l.* required for rebuilding and other incidental costs, charges, and expenses.

Warrington, Q.C., and *B. B. Rogers*, for the applicants, the trustees. It is clear that the proposed expenditure in pulling down and rebuilding the houses will be for the benefit of the infants and all others interested in the estate; and the only question, therefore, is whether the Court has jurisdiction to order the application of capital money in the manner proposed. Here the property is vested in trustees upon trust for infants and unborn persons, so that the Court is in effect executing the trusts of the settlement; and where that is the case, the Court, under its general jurisdiction, has a wide discretion to authorize trustees to do whatever is beneficial to the trust estate. In *Glover* v. *Barlow* (1), in a suit by trustees for administration, the decree included an inquiry what rebuilding and repairs were necessary and proper to be done, and whether it was for the benefit of the testator's estate that any part of his property should be sold or mortgaged for the purpose of rebuilding or repairs. So in *Frith* v. *Cameron* (2), which also was a suit for execution of trusts, the Court authorized the trustees to raise by mortgage 5000*l.* to be spent in rebuilding the mansion-house on the settled land.

[KEKEWICH J. That case can hardly be regarded as an authority.]

Again, in *Conway* v. *Fenton* (3), the Court sanctioned the expenditure of capital trust moneys in the erection of new buildings on the settled land.

[KEKEWICH J. *Conway* v. *Fenton* (3) was in the main a case of salvage; and as to the new buildings I treated the case as an

(1) (1831) Reported in a note to *In re Jackson*, (1882) 21 Ch. D. 788.
(2) (1871) L. R. 12 Eq. 169.
(3) 40 Ch. D. 512.

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application in advance of the principle of *Vyse* v. *Foster*. (1) There seems to be no doubt as to the jurisdiction of the Court where the expenditure is in the nature of salvage, the costs of which it is impossible to defray otherwise than out of capital; but no such case is shewn here.]

Conway v. *Fenton* (2) has not been questioned. It was not questioned by Chitty J. in *In re De Teissier's Settled Estates* (3), and it was followed to some extent in *In re Hurst*. (4) The only case against the exercise of the jurisdiction is *In re De Teissier's Settled Estates* (3); but there the question was as to the power of the Court to charge the interest of an infant tenant for life.

In *In re Hotchkys* (5) Lindley L.J. said that if it was shewn to be judicious to make repairs, and the trustees came to the Court for authority to make them, the authority would be given on equitable terms as to the mode of paying the expenses. The same principle can be applied in the case of rebuilding. In *Hibbert* v. *Cooke* (6), followed by Chitty J. in *In re De Teissier's Settled Estates* (3), an inquiry was directed as to money spent on rebuilding. On the whole, it is submitted that though, with the exception of *Frith* v. *Cameron* (7), there is no authority directly in point, the cases sufficiently shew that where the property is vested in trustees, as it is here, the Court has jurisdiction to order the expenditure of capital money in rebuilding; and if, as is also the case here, there is no money fund available, to authorize the raising of money by mortgage for that purpose.

H. E. Wright, for the tenant for life and his wife, adopted the same argument.

T. A. Nash, for the infants. I submit that the Court has no jurisdiction to make the order asked for. With the exception of *Glover* v. *Barlow* (8), all the cases cited which have any direct bearing were cases of salvage, where repairs were required to the mansion-house in which the infant beneficiaries

(1) (1872) L. R. 8 Ch. 309; (1874) 7 H. L. 318.
(2) 40 Ch. D. 512.
(3) [1893] 1 Ch. 153.
(4) (1891) 29 L. R. Ir. 219.
(5) (1886) 32 Ch. D. 408, 420.
(6) (1824) 1 S. & S. 552.
(7) L. R. 12 Eq. 169.
(8) Reported in a note to *In re Jackson*, 21 Ch. D. 788.

were to reside, or, as in *Frith* v. *Cameron* (1), where rebuilding was required because the house was past repair. No case of that kind is made here. In *Glover* v. *Barlow* (2) the infants were absolutely entitled. *Conway* v. *Fenton* (3) appears to be the only case in which expenditure of this kind has been allowed; and in *In re Lord de Tabley* (4) North J. said that *Conway* v. *Fenton* (3) depended on special circumstances, and did not lay down any principle. In *In re Hurst* (5) *Conway* v. *Fenton* (3) was followed to some extent; but the Master of the Rolls in Ireland held that the Court had no jurisdiction to authorize the erection of new buildings in the place of old houses, and therefore the case is an authority against the existence of the jurisdiction. Where the jurisdiction exists the cases appear to shew that it is competent to the Court to direct that the money required shall be raised by mortgage; but the Court has a discretion, and it is to be observed that in this case all that is required to be done could substantially be effected by granting an underlease for building purposes, and there is, therefore, no imperative necessity for raising the money by incumbering the settled estate.

Cur. adv. vult.

March 16. KEKEWICH J. It is proposed to raise a large sum of say 8500*l.* by mortgage of the only property comprised in the settlement of December 14, 1872, and to expend the money in pulling down the buildings now standing thereon, and in erecting others in their place. It is admitted that this is not authorized by any provision in the settlement, and further, that it does not fall within any class of improvements sanctioned by the Settled Land Acts. In a case recently before me it was argued that the original jurisdiction of the Court, whatever may be its extent and limits, touching the expenditure of money on land is ousted by the Settled Land Acts, which must be deemed to have established a code beyond which the Court has no power to go. That seemed to me then, and it

(1) L. R. 12 Eq. 169.
(2) Reported in a note to *In re Jackson*, 21 Ch. D. 788.
(3) 40 Ch. D. 512.
(4) 75 L. T. (N.S.) 328; W. N. (1896) 162 (16).
(5) 29 L. R. Ir. 219.

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still seems to me, to be an indefensible proposition, though I recognise and respectfully concur in the opinion of Chitty J. in *In re De Teissier's Settled Estates* (1), that those Acts must be regarded as affording a guide to the Court, and as of assistance in arriving at a proper conclusion. The question therefore is whether, apart from those Acts, there is jurisdiction to make the order asked. The trustees have properly only adduced such evidence as is necessary to prove that their proposal is reasonable, leaving all details as to the amount and manner of expenditure to be determined if and when that proposal has been sanctioned. It may be safely concluded on the evidence that it will be to the advantage of all parties interested to pull down the existing buildings, and to erect in their place others of a more modern character, and more appropriate to the neighbourhood, or in other words that, by the expenditure of about 8500*l.*, the value of the property will be largely increased both for letting and selling. It was suggested that the practical result desired, that is, the erection of new and better buildings, might be effected through the medium of a building lease; but the ordinary terms of such a lease would yield only a moderate rent for many years to come, and postpone the full enjoyment of the property for some generations. A prudent owner having money available for the purpose of rebuilding would, I think, so expend it, and not resort to a building lease. There is no money available, and if rebuilding is sanctioned the cost must be defrayed by means of a mortgage of the property. Mr. Warrington in substance admitted that the many authorities touching the jurisdiction of the Court respecting infants' property would not support the application. He endeavoured to support it on the ground that the Court is here executing the trusts of a settlement, and that in such a case it has a larger discretion and a more general jurisdiction. Confessedly there is no case going quite as far as what is now proposed; but it was urged that there may be extracted from the authorities a principle which may be safely applied to the present circumstances so as to justify the order asked. It becomes necessary, therefore, to examine the authorities.

(1) [1893] 1 Ch. 153.

Somewhat reluctantly I am compelled to commence with my own case of *Conway* v. *Fenton*. (1) In *In re Lord de Tabley* (2) North J. said he was tired of hearing that case cited, and I sympathise with him. I have more than once made the same remark. It seems to me that, whether treated as an example of salvage or an adaptation of the doctrine of *Vyse* v. *Foster* (3), that case was rightly decided. The necessity and immediate advantage of repairs were alike urgent, and the money spent was taken from a fund settled upon the same trusts as the premises repaired. I do not think that the decision can usefully be cited as professing to lay down any rule of law. It was commented on by Chitty J. from this point of view in *In re De Teissier's Settled Estates* (4) quoted for a different purpose above. He apparently thought that such expenditure as he was asked to sanction might be sanctioned if a case of salvage were established; but holding that the circumstances did not make it a case for salvage, he followed *Hibbert* v. *Cooke* (5), and declined to charge the settled property with the costs of structural alterations and repairs of the mansion-house. There it is to be observed there was personal estate settled upon trusts corresponding with the limitations of the real estate, so that no question about raising money by mortgage of the real estate was discussed. This happened also in *In re Lord de Tabley* (2), already mentioned, where likewise it was proposed to expend part of the personal estate in permanent repairs of the mansion-house. North J. declined to make the order, but followed *In re De Teissier's Settled Estates* (4), and regarded *Conway* v. *Fenton* (1) as sustainable, if at all, as a case of salvage. *In re Hurst* (6), before the Master of the Rolls in Ireland, was cited as more in the applicant's favour. The judgment is instructive, and I think that all the cases cited before me were referred to by the learned judge or by counsel. There no money was available, and it was proposed to raise the needed amount by mortgage, and this was

(1) 40 Ch. D. 512.
(2) 31 L. J. (N.C.) 638; 75 L. T. (N.S.) 328; W. N. (1896) 162 (16).
(3) L. R. 8 Ch. 309; 7 H. L. 318.
(4) [1893] 1 Ch. 153.
(5) 1 S. & S. 552.
(6) 29 L. R. Ir. 219.

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sanctioned so far as it was absolutely necessary to put the house into tenantable repair, the precise amount required being left for consideration in chambers according to what the learned judge styled a very moderate standard indeed. But he declined to authorize money to be raised for the construction of new buildings in the place of the old dwelling-house, which was proved to be in a dilapidated condition, on the ground that he had no jurisdiction to make any such order. *Conway* v. *Fenton* (1) was referred to and commented on, but mainly as an authority for the proposition that what might be done in an administration action might also be done on originating summons, as I have no doubt it might. So far I have no authority in support of the present application, and, as already pointed out, *In re Hurst* (2) is an authority against it. *Frith* v. *Cameron* (3) is a case of a different character. If I could regard that case as decided on a principle it would justify what is asked to be done here. It was proposed to pull down the mansion-house, and expend 5000*l.* in building a new one, and to raise that 5000*l.* by mortgage of the settled property. There was some evidence that the value of the estate, charged with the 5000*l.*, but with a residential house upon it, would be as great as or greater than the estate without a house, and apparently the then existing house was worthless. The question of jurisdiction was raised, and to some extent argued, and *Hibbert* v. *Cooke* (4) was cited, but I doubt whether the opposition was serious; and the Vice-Chancellor in making the order under the general jurisdiction of the Court justified it as being for the benefit of all parties under the peculiar circumstances of the case. There is no exposition of principle, no examination of authorities, and I think that it would be unsafe and unwise to treat that case as an authority for the jurisdiction purported to be exercised, unless it can be seen to be consistent with, if not supported by, the authorities. *Glover* v. *Barlow* (5) is another case where the Court authorized, in an administration suit, the mortgage of settled property, and sanctioned expenditure of money thus obtained

(1) 40 Ch. D. 512.
(2) 29 L. R. Ir. 219.
(3) L. R. 12 Eq. 169.
(4) 1 S. & S. 552.
(5) Reported in a note to *In re Jackson*, 21 Ch. D. 788.

on repairs. It appears that among other things rebuilding was proposed, and the inquiry directed by the decree was what rebuilding and repairs were necessary and proper to be done. The Master's report says nothing about rebuilding, and it appears that out of the money proposed to be raised by mortgage only 500*l.* or about one-seventh of the whole was ultimately directed to be expended in repairs. So far as the final order in *Glover* v. *Barlow* (1) sanctioned expenditure on repairs it must, I think, be taken to be a case of salvage, and so far as it did not sanction expenditure on rebuilding it is of course of no value to the applicant. The only other case which I need mention is *In re Hotchkys.* (2) Much learning is to be found in the judgments, and particularly in that of Cotton L.J., respecting the duty of trustees to keep property in repair and to provide for the incidence of the burden in proper proportions upon a tenant for life and remainderman; but I have been unable to find anything directly bearing on the question what ought to be done when rebuilding and not repair is under consideration. My conclusion from all the authorities is that, whatever the Court may have from time to time done in cases of salvage, or whatever may have been done without full consideration of the question of jurisdiction, the Court has never asserted a jurisdiction to spend settled money in pulling down and rebuilding houses. Indeed, the cases cited and some others, including *Drake* v. *Trefusis* (3), which there is no occasion further to mention, all in my judgment tend to shew that the jurisdiction does not exist, and that I believe is the sound view.

It is part of my duty to expound the jurisdiction of the Court, and this I have endeavoured to do. It is no part of my duty to expand it. I must therefore decline to make any order on the present application.

Solicitors: *Cree & Son; Wood, Bigg & Nash.*

(1) Reported in a note to *In re Jackson*, 21 Ch. D. 788.
(2) 32 Ch. D. 408.
(3) (1875) L. R. 10 Ch. 364.

C. C. M. D.

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March 16.

JENKS *v.* VISCOUNT CLIFDEN.

[1896 J. 89.]

Light—Obstruction—Actio personalis—Continuance of Obstruction—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 2.

The continuance of an obstruction to ancient lights is an "injury committed" in respect of property within the meaning of 3 & 4 Will. 4, c. 42, s. 2, giving rise to a cause of action de die in diem, and therefore an action in respect of the continuance of the obstruction in the lifetime of the person who caused it may be maintained against his executors or administrators notwithstanding that the obstructing building was completed more than six calendar months before his death.

Woodhouse v. *Walker*, (1880) 5 Q. B. D. 404, followed.

THE plaintiff, Maurice Jenks, was the owner of two freehold houses, Nos. 10 and 11, Cleveland Row, St. James, Middlesex, in respect whereof he claimed to be entitled to ancient lights.

Henry George Viscount Clifden, who was the owner of houses immediately opposite to the plaintiff's property, made certain alterations therein whereby, as the plaintiff alleged, his ancient lights were materially obstructed and interfered with. These alterations were begun on April 24, 1894, and completed on August 23, 1894.

Henry George Viscount Clifden died on March 3, 1895, and on August 5, 1895, letters of administration, with his will annexed, were granted to the defendants Leopold G. F. Viscount Clifden and Luke, Baron Annaly.

On January 15, 1896, the plaintiff brought this action, claiming, by his writ, against the defendants damages for obstructing the access of light and air to the plaintiff's houses, and an injunction, and costs, and so far as necessary administration of the estate of the deceased Viscount.

The defendants by their statement of defence, while not admitting that the alterations complained of affected the access of light or air to the plaintiff's houses, pleaded and relied on s. 2 of the statute 3 & 4 Will. 4, c. 42. (1)

(1) Sect. 2 of 3 & 4 Will. 4, c. 42, is, so far as is material, as follows: "And whereas there is no remedy provided by law for injuries to the real

For the purpose of obtaining a decision of the Court upon the point of law so raised by the defence, admissions of the dates and material facts above stated were made by the parties, it being agreed that, if the point of law was finally decided against the defendants, the question of the damage (if any) to the plaintiff's light was to be referred to an expert to be named by the judge on the footing that the defendants did not admit any obstruction.

Upon these admissions the action now came on for hearing.

Renshaw, Q.C., and *Rowden*, for the plaintiff. By the continuance of the obstruction to the plaintiff's ancient lights during the lifetime of the late Viscount Clifden there was a continuing "wrong committed" by him to the plaintiff within the meaning of 3 & 4 Will. 4, c. 42, s. 2, giving rise to a fresh cause of action de die in diem. That the mere allowing of a nuisance or obstruction to remain which it is in the power of the person causing or erecting it to abate or remove, gives rise to a fresh cause of action from day to day is clear from *Shadwell* v. *Hutchinson*. (1) In *Jones* v. *Simes* (2), decided under the first branch of the section, it was held by Chitty J. that the devisee and executrix of a deceased plaintiff who sued for a mandatory injunction and damages in respect of the obstruction of her ancient lights was at least entitled to continue the action for the recovery of damages in respect of injury during the six months before the death. In *Woodhouse* v. *Walker* (3) it was held that an action of tort in respect of permissive waste by

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estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, that . . . . an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person. . . ."

(1) (1831) 2 B. & Ad. 97.

(2) (1890) 43 Ch. D. 607.

(3) 5 Q. B. D. 404.

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a deceased tenant for life would lie against her executor, because the wrong was a continuing wrong giving a right of action de die in diem. That case is stronger than the present one, as the wrong there was merely permissive, and consequently not "committed" in the stricter sense of that word. The plaintiff does not claim damages for more than the period of six months before the death of the late Viscount, but asks the Court to declare that he is entitled to maintain the action, and recover damages for that period.

[*Kirk* v. *Todd* (1) and *Phillips* v. *Homfray* (2) were also referred to.]

Warrington, Q.C., and *George Lawrence*, for the defendants. The right of action which is claimed is entirely the creature of the statute 3 & 4 Will. 4, c. 42, and it is necessary, therefore, to construe the statute in order to see what the right of action is. The statute limits the right of action which it creates, first, by defining the wrong in respect of which the action is brought by reference to a certain period of time, and, secondly, by defining the injury as something which is to be committed within a certain period of time. According to the modern practice of the Court, in a case such as the present, the damages are ascertained once for all in respect of the injury done to the plaintiff by the diminution in value of his property: *Moore* v. *Hall* (3); *Pennington* v. *Brinsop Hall Coal Co.* (4); all possible future as well as existing loss is thus included, and it would not be possible now, as it would have been under the old practice—see *Battishill* v. *Reed* (5) and *Shadwell* v. *Hutchinson* (6)—for a plaintiff to bring one action to recover nominal damages in respect of obstruction to light, and afterwards to bring another for the recovery of substantial damages. *Woodhouse* v. *Walker* (7) is the only case cited which has any bearing on the present case, and there the action was in respect of permissive waste which could be stopped at any time, and until it was stopped the damages in respect of the diminution in

(1) (1882) 21 Ch. D. 484.
(2) (1883) 24 Ch. D. 439.
(3) (1878) 3 Q. B. D. 178.
(4) (1877) 5 Ch. D. 769.
(5) (1856) 18 C. B. 696.
(6) 2 B. & Ad. 97.
(7) 5 Q. B. D. 404.

value of the property by reason of the waste could not be ascertained. In the present case the erection of the building which obstructed the plaintiff's ancient light was the "wrong committed," and the consequent diminution in value of the plaintiff's house was the "injury committed," which the statute contemplates, and as the wrong and the injury were alike committed more than six months before the death of the late Viscount, the case is not within the statute, and the action is not maintainable.

No reply was called for.

KEKEWICH J. The defendants' first line of defence is that the right of action here claimed by the plaintiff is merely statutory, and therefore no action can be maintained except as expressly sanctioned by the statute. That seems to me to be sound, and the question is whether on that footing the action is maintainable. It might be possible to raise questions in this or in similar cases respecting the words in the statute, "for any wrong committed by him in his lifetime to another." The offending house here was completed more than six months before the death of the late Viscount Clifden, and there might be a question how far any wrong was committed by him after the date of the completion; but nothing has turned upon that. The argument turns on the words which follow, "so as such injury shall have been committed six calendar months before the death." The question is not when the wrong was committed, but when the injury was committed. The injury seems to me to have been committed not by the completion of the house, but by the continuance of the obstruction from day to day. Each day the offending house continued to be on the land, injury was done to the obstructed house, and so strictly there was injury from day to day. That seems to me to be exactly what was decided in *Woodhouse* v. *Walker* (1), and explained in the judgment of Lush J., and I observe that in quoting the statute, which he does on pp. 407, 408, he leaves out the words which I have said are not material for the present purpose as not being material for his purpose, and begins with

(1) 5 Q. B. D. 404.

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the words "so as such injury, &c." He says "the wrong"—it was a case of permissive waste—"of not repairing was a continuing wrong, giving a cause of action de die in diem up to the day of the death of the tenant for life, and the action was brought within the six months after the death." That is a direct authority upon the words of the statute that any continuing wrong giving a cause of action arising within the period of six calendar months before the death of the wrong-doer is an injury committed within six calendar months from the death, because the injury accrues from day to day. The answer made to that is that under modern procedure damages for injury by obstruction of light must be assessed not with reference to the issue of the writ, but with reference to the real injury to the property once for all, and therefore, it is argued, there is no injury committed from day to day. That argument seems to confuse the damages which may be recovered for the injury, and the injury which gives rise to the damages. I put to Mr. Warrington the case of an action for obstruction of light against a person who, after action brought, causes the offending building to be pulled down. Of course there is in that case a right to recover damages up to the time when the building was pulled down. But until the action is brought the plaintiff cannot tell what the injury will be. When he brings his action he gets the proper amount of compensation assessed as damages to his house by reason of the obstruction of light. The fact that when he brings his action he has damages once for all, and not up to the issue of the writ, does not in the least interfere with the right to complain in respect of the continuing injury. The meaning of the statute as I understand it is this. At common law an action of this character fell within that class which was not permitted as against the representative of a deceased person, inasmuch as the right of action against him personally ceased at his death. It was intended to remedy that state of things, and that, subject to certain limitations and restrictions as regards time, a person whose light was obstructed or who could complain of a trespass should be entitled to bring his action against the representative of a deceased person just as if the deceased were still alive, and

the action were brought against him. The restrictions are inserted to prevent the grievance which it was intended to remove being succeeded by a grievance in the opposite direction; but, subject to the restrictions, the representative seems to me to be placed on the same platform on which the testator or intestate was in his lifetime. In my opinion, therefore, this action can be maintained; and there must be a declaration that the plaintiff is entitled to maintain his action and to recover damages for the obstruction so far as those damages were sustained during six months preceding the death of Lord Clifden.

Solicitors: *Lewis & Lewis; Foyer & Hordern.*

C. C. M. D.

In re BATTAMS & HUTCHINSON.

[1896 B. 4490.]

Practice—Costs—Taxation—Client and Assignee, Application by—Bankruptcy of Client—Submission to Pay—Form of Order.

The usual submission in an order for taxation of a solicitor's bill of costs to pay the solicitor what shall appear to be due to him on the taxation, must be made by the person or all the persons on whose application the order is made, whether the application is by the client alone or in conjunction with an assignee of all his interest under the taxation; the assignee being bound, as a condition of obtaining the order, to join in the submission even though the client is a bankrupt.

ON October 30, 1896, one Alexander de Svertchkoff took out a summons against his former solicitors, Messrs. Battams & Hutchinson, for the delivery within seven days of particulars of their bills of costs, amounting to 1658*l.*, already delivered, and for taxation of such bills, together with five other bills. At that time Svertchkoff was insolvent and threatened with bankruptcy.

On January 21, 1897, Stirling J., for Kekewich J., made an order on that summons for delivery of bills and a cash account to the applicant on or before February 11, 1897, and

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directed the rest of the summons to stand over with liberty to apply.

Mr. T. P. Harker, Svertchkoff's present solicitor, was, by the direction of Stirling J., made a co-applicant on that summons and order, he having a charge or assignment from his client of whatever balance, if any, might be found due to the client on the taxation.

On February 11, 1897, Messrs. Battams & Hutchinson delivered to Svertchkoff certain bills and cash accounts, which however he considered insufficient, and thereupon both Svertchkoff and Mr. Harker served Messrs. Battams & Hutchinson with a notice of motion requiring them within four days to deliver to the applicants certain bills of costs and disbursements and also the particulars of certain items in a cash account. That motion came on before Kekewich J. on February 19, 1897, when he made an order on both the motion and the original summons referring the whole of the bills for taxation and reserving the costs of the motion. In the meantime Svertchkoff had actually become bankrupt, and he had not yet obtained his discharge. Upon the matter coming before the registrar for the order to be drawn up, he inserted in the order the usual submission (see common form in Seton, 5th ed. p. 230), to pay what should be found due to the respondents the solicitors on the taxation, the submission purporting to be made by both applicants, that is, Svertchkoff and Mr. Harker, his solicitor. As by reason of Svertchkoff being an undischarged bankrupt Mr. Harker objected to joining in the submission, the registrar referred the matter to Kekewich J.; and by his Lordship's direction the motion now came on again for argument as to the form of the minutes of order.

Eustace Smith, for the applicants, Svertchkoff and Harker. There is no practice, and no authority, in favour of the view that any one but the client should submit to pay. The jurisdiction of the Court to direct taxation is based solely on the relation of solicitor and client, and the submission to pay, which is always inserted in an order for taxation made on the application of the client, arises out of that relation—a relation which

does not subsist between an assignee of the client and the solicitor.

Stephen Lynch, for the respondents, Messrs. Battams & Hutchinson. Mr. Harker is the assignee of whatever rights our late client, Svertchkoff, may have against us under the taxation. He cannot say that he is an assignee for some purposes and not for others: if he chooses to join in the application for taxation as assignee of the client, he must stand wholly in the shoes of the client. In an ordinary case the only person who can have a bill taxed is the client; but if the client assigns all his interest in the bill to a third person and that third person, either by himself or in conjunction with the client, obtains an order for taxation he must make the usual submission to pay. It has been decided that the assignee in bankruptcy of a client who has become bankrupt cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill: *In re Elmslie & Co.* (1) And there are other cases shewing that the mortgagee or assignee of the client stands in his shoes for the purposes of taxation: *Clarkson* v. *Parker* (2); *In re Allingham.* (3) Therefore I submit here that as the client would have had to enter into the usual submission to pay, his assignee is equally bound to do so.

Eustace Smith, in reply. Svertchkoff is willing to give an undertaking to pay, but his solicitor, Mr. Harker, is not willing to do so.

[KEKEWICH J. Either Mr. Harker must submit to pay, or this motion will be dismissed with costs.]

Then Mr. Harker will give the undertaking, though as a matter of practice I submit that his client only should do so. The respondents are sufficiently protected by Stirling J.'s order making Mr. Harker party to the proceedings.

KEKEWICH J. The position here is rather a strange one. In the first place, there was a summons issued before me on October 30, 1896, by a Mr. Alexander de Svertchkoff, whom I will refer to as "the original applicant." That was a summons

(1) (1869) L. R. 9 Eq. 72. (2) (1838) 7 Dowl. 87.
(3) (1886) 32 Ch. D. 36.

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for the delivery within seven days of certain bills of costs, and for taxation. It seems to have been a special summons, at any rate not one for the common order.

That summons was heard on January 21, 1897, before Stirling J., who made an order of that date. That order was stated to be made on the application of the original applicant, combined with Mr. Harker, the then solicitor of the original applicant. I am told that Stirling J. thought that Mr. Harker ought to be joined as applicant because he had a charge or assignment of the balance, if any, that might be found due to his client on the taxation, and because the client, the original applicant, though not then a bankrupt, was in such a position that bankruptcy was imminent. Stirling J.'s order was that the solicitors, the respondents, should by a certain day deliver their bills of costs and also their cash account; but no order for taxation was made, and the rest of the summons was ordered to stand over with liberty to apply. Why that summons was not brought on again I do not know; but instead of it being brought on again before me, there was a motion before me on February 19, 1897, notice having been given for that day on behalf of the original applicant and of Mr. Harker, his solicitor. That motion was that the respondents should within four days deliver to the applicants certain bills of costs and disbursements, and also particulars of certain items in a cash account, and that was all. In the result, I said that the whole of the bills ought to be taxed, and accordingly made an order referring all of them to taxation, but reserving the costs. When the matter came before the registrar, he of course put in the usual submission to pay by both applicants—that is, the original applicant and his solicitor, Mr. Harker. The original applicant, who had in the meantime become bankrupt, had not the slightest objection to submit to pay: it may be assumed that he knew that this burden was cast upon him. At any rate, having become a bankrupt, it was not of much importance to him whether he submitted to pay or not; but that very fact made the solicitor, Mr. Harker, hesitate, because he foresaw that a submission to pay might be disastrous to himself. He objected to submit to pay. The matter then came from the registrar to me, and I

said that it should be discussed in court. The respondents required that the order should go on a submission to pay both by the original applicant and his solicitor, Mr. Harker, and they objected to allowing the order to go for taxation of all these bills upon the submission to pay of the original applicant only, he being a bankrupt. The question, then, which I have to decide is whether the order should go on the submission of both applicants. It is the established practice that where the application is by the client an order for taxation is never made without his submission to pay. That of course rests upon the relation of solicitor and client. The client admits the retainer for the purpose of the business under consideration: he admits the relation, and therefore the liability to pay what is properly due; and if he puts the solicitor to the expense and trouble of taxation, he is bound to pay what is eventually found to be due. That is perfectly right.

Mr. Eustace Smith says that all you are dealing with under an order for taxation is the original jurisdiction of the Court—that is, the jurisdiction arising out of the relation of solicitor and client and resting upon that; and that therefore the submission to pay is the submission of the client, and of the client only, and flows from the relation of solicitor and client, and nothing else; and that therefore the other applicant, Mr. Harker, who comes here as assignee of whatever, if anything, is due to the client, is under no liability to submit, the submission of the assignee of the client not arising out of the relation. That, to my mind, is not the proper way of putting it. The submission does arise out of the relation of solicitor and client: it is something evoked from that relation, and the person who makes the application, if he is entitled to make it at all, must also be the person who submits to pay. He cannot have it both ways. If he is entitled to the order he must have it in the proper form. I think he is entitled, up to the last moment, at any rate before the order is passed, to say, "I never intended to submit to pay, not being a client." He is entitled to raise that objection; and therefore it is that the matter now comes before me. He must take his choice. Either he takes the order, or he does not. If he takes it, it must be by submitting to pay. If he does not

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submit he cannot have the order, and his motion then fails because he has not complied with the practice of the Court. In the present case that position has been pointed out to Mr. Harker, and I understand that he is now willing to join in the submission to pay. The order must therefore go in that form. All the costs will be reserved.

Solicitors: *E. Swain, for T. P. Harker, Brighton; J. Battams, for Battams & Hutchinson, Ealing.*

G. I. F. C.

TADCASTER TOWER BREWERY COMPANY *v.* WILSON.

ROMER J.

1897

Feb. 23; *March* 17.

[1896 T. 258.]

*Vendor and Purchaser—Agreement for Sale of a Public-house—Transfer of Licence—Interim Protection—Licence "Indorsed or otherwise affected"—Specific Performance—*9 *Geo.* 4, *c.* 61, *ss.* 4, 11, 14—5 *&* 6 *Vict. c.* 44, *s.* 1.

A contract for the sale and purchase of a licensed public-house, not containing any special undertaking by the vendor that the licence shall be renewed at the Brewster Sessions, or that he will obtain from the magistrates a transfer of the licence to the purchaser's nominee at the next special sessions, or interim authority for that nominee to use the licence between the date fixed for completion and the next special sessions, does not bind the vendor to free the purchaser from risk in respect of any of the above-mentioned matters. The vendor is bound only to have a valid and effectual licence existing at the date fixed for completion which he can indorse in the usual way, and upon or in respect of which the purchaser can apply at once for interim protection under s. 1 of 5 & 6 Vict. c. 44, at the next special sessions.

The statement in Dart's Vendors and Purchasers, 6th ed. vol. i. p. 483, that "if the vendor cannot, by the day appointed for the completion of the purchase, procure a transfer of the licence under the Licensing Act, the purchaser may repudiate the contract," is too wide.

Day v. *Luhke*, (1868) L. R. 5 Eq. 336; *Claydon* v. *Green*, (1868) L. R. 3 C. P. 511, and *Cowles* v. *Gale*, (1871) L. R. 7 Ch. 12, observed upon.

ACTION by purchasers for rescission of agreement for purchase of a public-house, and counter-claim by vendors for specific performance.

By an agreement dated December 31, 1895, made between the defendants of the one part and the plaintiffs of the other part, the defendants agreed to sell and the plaintiffs to purchase a certain freehold house and shop with the off beer licence attached thereto and other premises at the price of 725*l.* By clause 9 it was agreed that if the licence or magistrate's certificate in respect of the said house and shop should be indorsed or otherwise affected prior to the completion of the purchase, the said agreement should at the option of the plaintiffs be abandoned and the deposit (72*l.*) returned to them.

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By arrangement the date of completion, though not inserted in the agreement, was fixed for January 22, 1896. The plaintiffs accepted the title, and the defendants on January 16 returned the draft conveyance approved to the plaintiffs. The purchase was not completed on the day fixed, and on January 23, 1896, an application was made by the plaintiffs to the justices of the peace for the district for a temporary authority for their nominee to carry on the business at the said premises until the next transfer day. The hearing of the application was adjourned to January 27, 1896, when it was refused; and on January 28, 1896, the plaintiffs gave the defendants written notice to determine the agreement, claiming a return of the deposit, and on their refusing to return the same this action was commenced.

The plaintiffs alleged that by reason of the decision of the justices the defendants became and were unable to carry out the agreement, or to transfer the licence or magistrate's certificate to the plaintiffs, and, moreover, that by reason of the decision the licence or certificate became and was "affected" within the meaning of clause 9 of the agreement.

The defendants in their defence alleged that they were on January 22, 1896, and still were, able and willing to execute the conveyance, and to deliver to the plaintiffs vacant possession of the premises, and to execute and do all such acts and things as might be necessary and proper or usual in such cases to enable the plaintiffs to apply for the transfer of the licence or certificate to the plaintiffs or their nominee; and that the licence or certificate had not been indorsed or otherwise affected, nor had the tenant been proceeded against or convicted of any offence against the licensing laws; and further, that the application to the justices had been made without the consent of or notice to the defendants, and before the plaintiffs were in a position to make the same, it having been an application for a temporary authority under s. 1 of 5 & 6 Vict. c. 44, in favour of a stranger, whereas the licence was not capable of being transferred except at the special sessions held for that purpose under s. 4 of the Act 9 Geo. 4, c. 61. And they counter-claimed for specific performance of the agreement.

Farwell, Q.C., and *Butcher*, for the plaintiffs. There has been no default on the part of the purchaser: the vendor has agreed to transfer the licence, which is an essential part of the property. The renewal of the licence having been refused by the magistrates, we say that it is "affected" within the meaning of clause 9 of the agreement, and that we are entitled to rescind the contract: *Day* v. *Luhke* (1); *Claydon* v. *Green* (2); *Cowles* v. *Gale*. (3)

Neville, Q.C., and *R. J. Parker*, for the defendants. The application under which the interim authority to carry on the licence was refused was misconceived. Under s. 11 of the Act 9 Geo. 4, c. 61, the application must be made at the special sessions by the holder of the licence, and the authority must be indorsed on the licence; and by s. 1 of 5 & 6 Vict. c. 44, the justices in petty sessions are empowered in these cases in which at a special sessions the justices may transfer licences to authorize any person to whom it may be proposed to transfer a licence to carry on the business till the next special sessions. The vendor does not warrant that the licence will be transferred. The purchaser must take the risk of that. If the vendor is ready and willing to fulfil the contract, and if his licence is clean, that is all that is required of him.

The vendor is not bound to get interim protection nor to obtain a transfer of the licence; and the purchaser is only entitled to determine the contract if the licence is "affected," and in this case the licence is clean.

Farwell, Q.C., in reply. The authorities shew clearly that if the vendor cannot by the day appointed for completion procure a transfer of the licence the purchaser may repudiate the contract: Dart's Vendors and Purchasers, 6th ed. vol. i. p. 483. No doubt the cases cited were dealing with actual transfers, but the observations are applicable to the present case. Time being of the essence of the contract, the vendor must shew that he was in a position to give a transfer or interim protection.

Cur. adv. vult.

(1) L. R. 5 Eq. 336. (2) L. R. 3 C. P. 511.
(3) L. R. 7 Ch. 12.

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March 17. ROMER J. The defendants were on the day fixed for the completion of the purchase (January 22, 1896), and they have ever since continued to be, the owners of the licence referred to in the contract of sale. And it is admitted by the plaintiffs that throughout this time the licence has been what is commonly called a "clean" licence, that is to say, it has never been indorsed, and the defendants have done nothing to render it liable to be indorsed, and the tenant has never been proceeded against or convicted of any offence against the licensing laws.

But the plaintiffs say that under clause 9 of the contract the licence became "affected" within the meaning of that word as used in the clause by reason of the circumstances hereinafter stated, and that consequently they were entitled to put an end to the contract.

In my opinion this contention fails. The circumstances are these. The plaintiffs postponed the completion, and then, without previously consulting the vendors or obtaining any indorsement of the licence, or asking the vendors to attend or assist the plaintiffs, they applied to the magistrates for temporary authority until the next transfer day to carry on the licensed business in the name of a nominee of theirs. The magistrates appear to have declined to give this temporary authority, and it is said they did so on the ground that there was no necessity for the licence. Thereupon without more the plaintiffs tried to put an end to the contract.

Now it appears to me that the plaintiffs had no right to rely on the result of an application so made as being something which affected the licence. The defendants had done nothing whatever to prejudicially affect the licence, and indeed, in fact, the licence remains to this day perfectly clean and unaffected as it was at the date of the contract. Moreover, I am not surprised that the magistrates should have refused the application seeing the irregular way in which it was made. I see no sufficient reason for supposing that the magistrates would have refused it if it had been made in the ordinary way under s. 1 of the Act 5 & 6 Vict. c. 44, upon or immediately after completion, when the applicants could have made it clear to the magistrates

that the application was the ordinary one by a purchaser merely asking for interim protection until the next transfer day. Having regard to the reason said to have been given by the magistrates for refusing the application that was made, I cannot help thinking that they were under the impression that the application was one under s. 14 of the Act of 9 Geo. 4, c. 61. However, be this so or not, it appears to me that by what passed the licence could not be said to be affected within the meaning of clause 9 of the contract. I ought to add, with reference to an argument that the words in clause 9 "or otherwise affected" would have no operation unless they extend to some such case as this, that those words were probably intended to cover cases where, though the licence had not in fact been indorsed, the vendors had done something which rendered it liable to be indorsed.

The plaintiffs next take up the position that under this contract the obligation rested on the vendors of procuring from the magistrates the temporary authority for the nominee of the purchasers to carry on the business until the next transfer day. Now, in the first place, as already appears, even if this obligation had been cast on the vendors, the plaintiffs gave them no opportunity of discharging it. But in my opinion no such obligation rested on the vendors. The purchasers knew at the date of the contract that the licence was not like property of the ordinary kind, the full advantage of which could be assigned to them by the vendors without any other steps being taken, and doubtless it was this knowledge on the part of the purchasers which induced them to protect themselves by clause 9 of the contract with which I have already dealt. For example, the purchasers knew that the licence might not be renewed at the annual Brewster Sessions (as I believe they are called); and, further, that the magistrates at the special session next after the completion of the purchase might not assent to the transfer of the licence to their nominee when the ordinary application was made to them under s. 11 of the Act 9 Geo. 4, c. 61; and, lastly, that if they wanted to use the licence by their nominee between the completion and the next special sessions, application would have to be made to the magistrates

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under s. 1 of the Act 5 & 6 Vict. c. 44, and that that application might be refused.

Now in the case of a contract of sale of a licensed house there may, of course, be special provisions shewing that the vendor has taken upon himself the obligation of freeing the purchaser from all risks in respect of all or any of the above-mentioned matters. That is to say, the vendor may specially contract that the licence shall be renewed at the Brewster Sessions, or that he will obtain from the magistrates a transfer of the licence to the purchaser's nominee at the next special sessions, or interim authority for that nominee to use the licence between the date fixed for completion and the next special sessions. But, in the absence of such special provisions (and there are none such in the case before me), in my judgment the vendor does not take upon himself any of the above risks. All that he is bound to do is to have a valid and effectual licence existing at the date fixed for completion which he can indorse in the usual way, and upon or in respect of which the purchaser could apply at once for interim protection and without undue delay under s. 1 of the Act 5 & 6 Vict. c. 44, at the next special sessions. I think the vendor is not bound to do more, except that if asked he should join with the purchaser, or authorize the purchaser to use his name, in the application to the magistrates for the interim protection and transfer of licence. Indeed, in the case before me the counsel for the purchasers did not venture to argue (and I think rightly) that if the purchase had been completed on the day fixed and interim protection obtained the vendors would have been bound to obtain a transfer of the licence to the purchasers' nominee at the next special sessions; but they did argue that the vendors were bound to get the interim protection for that nominee. I cannot see why the vendors should be so bound. Suppose the magistrates refused interim protection, giving as a reason that they did not approve of the nominee, or suppose they gave no reason (and in this case they were not bound to give reasons), but their real ground, if it could be ascertained, was disapproval of the nominee. Would that free the purchasers from their contract? I think it clearly ought not to do so, and I cannot see on principle why

I should hold that there is anything in the nature of a warranty by the vendors of interim protection, or any obligation on them beyond what I have already pointed out. And certainly the cases do not support the plaintiffs' contention, or justify the too widely phrased statement in Dart's Vendors and Purchasers, 6th ed. vol. i. p. 483, that "if the vendor cannot, by the day appointed for the completion of the purchase, procure a transfer of the licence under the Licensing Act, the purchaser may repudiate the contract."

What the cases do decide is that upon the sale of a public-house as a going concern time is of the essence of the contract. In *Day* v. *Luhke* (1) that principle was held fatal to the vendors, because they did not hold a licence in respect of which the ordinary application for a transfer could be made without delay under s. 11 of the Act 9 Geo. 4, c. 61. So in *Claydon* v. *Green* (2), the principle was applied where the vendor had no valid licence at all, and where, moreover, there were special provisions in the contract as to the transfer of the licence. And, lastly, the case of *Cowles* v. *Gale* (3) was one where at the time fixed for completion the vendors had no licence to hand over to the purchaser. I may add that the statements in *Day* v. *Luhke* (1) and *Claydon* v. *Green* (2) as to the practice on transfers of public-houses appear to me in no way to support the argument on behalf of the plaintiffs in the case before me.

The result is that the plaintiffs have failed, and their action must be dismissed with costs. It is, however, said on their behalf that, at any rate, I ought not to decree specific performance on the counter-claim. I do not see any sufficient reason why I should not do so. The vendors are not to blame for the delay or in any way, and still have a perfectly clean and valid licence, and are ready and willing and offer to join with the plaintiffs, or to allow their names to be used by the plaintiffs, in any proper application to be made by the plaintiffs for interim protection or for transfer of the licence. And if the nominee of the plaintiffs be a fit and proper person, I cannot help thinking that the magistrates, on proper application being made to

(1) L. R. 5 Eq. 336. (2) L. R. 3 C. P. 511.
(3) L. R. 7 Ch. 12.

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them, will allow the transfer to him of the licence and give him interim protection, even though at the general Brewster Sessions they may have to consider the question whether the licence shall be renewed. But in any case, the vendors having in nowise broken their contract, but being always able, ready, and willing to perform it, I think they are entitled to specific performance, even if it turns out that the purchasers may not get the full benefit from the licence that they hoped for. The purchasers bought the house and its licence with its risks attaching, and even if the bargain proves a bad one for them, that is no sufficient reason for letting them escape from the contract to the injury of the innocent vendors.

I therefore, on the counter-claim, decree specific performance of the contract, prefacing the order by the offer of the defendants above mentioned; and the plaintiffs must pay the costs of the counter-claim.

Solicitors: *Emmet & Co., for Leeman, Wilkinson & Badger, York; Clarke & Blundell, for Joseph Richardson, Bradford.*

G. M.

ROMER J. 1897 *March* 19.

In re DUKE OF MARLBOROUGH AND GOVERNORS OF QUEEN ANNE'S BOUNTY.

Vendor and Purchaser—Settled Land—Settlement of Chattels as Heirlooms—Land charged with Jointures and Portions—Sale of Heirlooms—Land purchased with Proceeds—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 21, *sub-s.* 7; *s.* 22, *sub-ss.* 5, 7; *s.* 24, *sub-ss.* 2, 4, 5; *s.* 37.

Where land is settled and chattels are also settled to devolve with the land as heirlooms, the settled land being charged with jointures and portions for younger children, on a sale of the heirlooms under s. 37 of the Settled Land Act, 1882, and the investment of the proceeds in land, the land so purchased is not subject to the charges created by the settlement affecting the land settled.

In re Duke of Marlborough's Settlement, (1886) 32 Ch. D. 1, observed upon.

By a settlement dated July 14, 1866, and made between John, seventh Duke of Marlborough, of the first part; George,

afterwards eighth Duke, then Marquis of Blandford, of the second part; and trustees of the third part, the Blenheim estates were resettled after the death of the seventh Duke of Marlborough, and, subject to a jointure payable to his wife, Frances, Duchess of Marlborough, to the use of the eighth Duke during his life, with remainder to the use of his first and other sons successively in tail male. By the same indenture certain pictures and other works of art were settled in trust that the trustees thereof should allow the same to be used and enjoyed, so far as the rules of law and equity would permit, by the person or persons who should for the time being be in the actual possession or in the receipt of the rents and profits of the settled estates. The said indenture contained a power for the eighth Duke to charge the settled estates with a jointure in favour of any woman whom he might marry, and with portions for his younger children.

John, seventh Duke of Marlborough, died in July, 1882.

In the year 1884 certain of the heirlooms were, under the order of the Court pursuant to sub-s. 3 of s. 37 of the Settled Land Act, 1882, sold to the Trustees of the National Gallery, and the purchase-money of the same was received by the persons who were then the trustees of the settlement for the purposes of the Settled Land Act.

In the year 1885 a portion of the said purchase-money was, by the direction of the eighth Duke, laid out in the purchase of certain freehold messuages in Leadenhall Street, in the City of London, which were conveyed unto and to the use of the trustees of the settlement in fee simple, upon the trusts and subject to the provisoes, provisions, agreements, and declarations contained in the settlement, upon, with, and subject to which the same ought to be held as proceeds of trust moneys under the Act. And by an indenture of lease dated December 21, 1885, the eighth Duke demised the same messuages for the term of ninety-nine years at the yearly rent of 1200*l.*

The eighth Duke, on the occasion of his first marriage, which was afterwards dissolved, charged the settled estates with a jointure payable to his wife after his death, and with portions for his children other than the eldest or only son; and on the

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occasion of the marriage with his second wife he also executed a deed purporting to charge the settled estates with a jointure for her.

The eighth Duke died in November, 1892, leaving the wives both by his first and second marriage, and four children—namely, the applicant, the ninth Duke, and three daughters, and also the said Frances, Duchess of Marlborough—surviving him, who were all still living.

The applicant attained twenty-one in November, 1892, and thereupon barred the entail in the settled estates, and also any entail which might be subsisting in the above messuages and other hereditaments purchased with the proceeds of sale of the heirlooms; and subsequently the trustees of the settlement conveyed the said messuages and other hereditaments so purchased to the applicant in fee.

The applicant having contracted with the Governors of Queen Anne's Bounty for the sale to them of the freehold ground-rent of 1200*l.* secured on the said messuages, and a question having arisen on the title whether or not the charges above mentioned affected in equity or otherwise property purchased with the proceeds of sale of the heirlooms, this summons was taken out to have it declared that the applicant was able to make a title to the land on the basis of the same not being or having been affected by any charge or power of charging which did not affect the heirlooms with the proceeds whereof the said land was purchased.

Levett, Q.C., and *W. C. Druce*, for the applicant, the vendor. By s. 37, sub-s. 2, of the Settled Land Act, where personal chattels are settled the money arising by the sale shall be capital money arising under the Act, and shall be dealt with in all respects as by the Act directed with respect to other capital money arising under the Act. As to land acquired by purchase, s. 24, sub-s. 5, enacts that where a charge does not affect the whole of the settled land the land acquired shall not be subjected thereto unless the land is purchased with money arising from the sale of land which was before the sale subject to the charge. In this case the heirlooms were not charged; therefore

the land purchased with the proceeds of sale of the heirlooms is not charged. There is no provision in the Act with regard to the proceeds of sale of heirlooms if the same are laid out in the purchase of land. Looking at all the provisions of the Act, and particularly ss. 21, 22, sub-s. 5, and s. 24, the word "land" in those sections must be taken to include heirlooms, and the moneys arising from the sale must be regarded as capital moneys arising from the sale of land. We submit that a good title is shewn.

W. E. Capron, for the purchasers. Money arising from the sale of heirlooms is not money arising from the sale of land: *In re Duke of Marlborough's Settlement.* (1) So none of the provisions of the Act relating to capital money arising from the sale of land have any bearing on moneys arising from the sale of heirlooms; and, there being no provisions in the Act with regard to the proceeds of sale of heirlooms when invested in land as in this case, I submit that when the proceeds of sale of heirlooms are invested in land, such land is subject to the trusts of the settlement and to the charges thereby created.

Levett, Q.C., in reply.

ROMER J. The heirlooms that were settled were not subjected at the time they were sold to the charges that the settled land was subject to. The heirlooms were sold under the provisions of s. 37 of the Settled Land Act, 1882. The proceeds of sale admittedly, before they became invested, were not subjected in any way to the charges that the settled land was subject to; but a portion of the proceeds of sale has been invested in the purchase of other freehold lands, which have been conveyed to the trustees of the settlement. I have looked at that conveyance, and it is what I may call an innocent conveyance. It certainly does not in terms purport to render the freeholds bought with the proceeds of the heirlooms subject to the charges affecting the settled land. The words of the conveyance, so far as they deal with the trusts upon which the trustees were to hold the purchased lands, are as follows: "Upon the trusts and with and subject to the provisoes provisions

(1) 32 Ch. D. 1, 10.

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agreements and declarations contained in the indenture of resettlement upon with and subject to which the same ought to be held having regard to the source from which the said sum (that is to say the proceeds invested) has arisen." Clearly, then, there is nothing in the conveyance itself to subject these lands purchased to the charges in question. Am I then in any way compelled to say that, notwithstanding this, the purchased land must be treated, or ought to be settled or held, as subject to the charges affecting the settled land, although the chattels, the heirlooms, were not so subject, nor were the proceeds of sale of those heirlooms before the investment? The result, I think, if I were obliged so to hold, would be an extraordinary one. It would be a most extraordinary result that, if heirlooms that were in no way subject to a charge affecting the settled land were sold, and the proceeds of sale invested in buying other land, that land must, ipso facto, from the purchase become subjected to the charges affecting the settled land, although the money which went to buy that land was in no way subject to the charge. I do not believe that the Legislature intended such a result, and I am bound to say I do not see when I carefully consider the Act that I am driven to any such conclusion.

When s. 24, sub-s. 5, is looked at, it is clear that if the settlement affected two estates, one subject to certain charges and the other free from them, if the free estate was sold and the proceeds applied in buying other land, that land would have to be settled so as not to be subjected to the charges affecting the charged estate. The Legislature has carefully prevented any difficulty arising with regard to such a case. It seems to me incredible to suppose that though when a settled estate is sold which is not subject to a charge, the proceeds or the investment of those proceeds are free from any charges affecting another estate subject to the same settlement, yet the Legislature intended that if heirlooms which are free from a charge are sold, that then the proceeds if invested in land must be subject to the charges affecting the settled land. I do not think I am compelled to arrive at any such absurd conclusion. Though s. 37 declares that money arising from the sale of the heirlooms is to be regarded as "capital money arising under this Act," and

undoubtedly as capital money arising under the Act, it can be invested in land which has to be settled, yet I have to turn to s. 24, which determines upon what trusts and to what uses the purchased land is to be conveyed. Now I find that in s. 24, sub-s. 2, there is this provision: the freehold land purchased (and the land bought here was freehold land) "shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit." Now I will assume for the moment that the words "settled land" used there, in reference to the settlement now before me, do not refer in any way to the heirlooms, but only concern the settled land strictly speaking. Still this subsection does not compel a settlement, abjectly, so to speak, on the lines of the settled land—on the uses or according to the trusts on which the settled land is held. It very properly—and the circumstances of this case shew how properly—added these words: "or as near thereto as circumstances permit"; that is to say, the circumstances of the case are to be looked at, and the land purchased is to be settled as nearly as possible to the uses and upon the trusts of the settled land as the whole of the circumstances permit. Now, I think one of the circumstances which has to be borne in mind in the case before me is this—that this land is bought with the proceeds of the heirlooms which were not subjected to charges at all; and in my opinion they ought not to be so settled as to subject the purchased land to charges to which the purchasing money was not subjected at all. I think that is a circumstance that has to be borne in mind, and that under the words "as near thereto as circumstances permit," the land bought ought to be settled upon the uses and according to the trusts and subject to the powers and provisions affecting the settled land, bearing however this in mind, that the purchasing money was free from the charges, and that the purchased land ought to be settled free from them.

I do not think, therefore, that there is anything in s. 24, nor indeed in any part of the Act, which compels me to say that

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this purchased land must be settled so as to make it subject to the charges affecting the settled land; and sub-s. 5 of the same section shews what the Legislature has declared ought to be done in an analogous case, and that ought to be a guide to what ought to be done in the case before me.

But there is another and a broader view that I think may fairly be taken of the case before me, though this is a point of view about which there may be, I am bound to say, considerable doubt especially having regard to what has been said by certain of the judges of the Court of Appeal to which I shall refer. Sect. 37, which permitted the sale of the heirlooms, states that the moneys arising by the sale shall be capital moneys arising under the Act. Now, capital moneys arising under the Act, apart from s. 37, are capital moneys arising from dealings with land, and, putting it shortly, I think that the meaning of s. 37 is this, that the money arising from the sale of the heirlooms shall be treated as capital money arising from the sale of land—that is to say, that for the purposes of this section the heirlooms are to be regarded as if they had been settled land. If that be a correct view, then it will be found that the Act works well throughout. There is no casus omissus. Take s. 24, sub-s. 5, that would in this case apply, because, for the purposes of the Act regarding the lands that were settled, and the heirlooms that were settled, as being land constituting the whole of the settled land within the meaning of sub-s. 5, it would follow that having sold the heirlooms, which are to be regarded for this purpose as settled land, and seeing that the lands purchased with the proceeds of those heirlooms would be lands acquired by purchase with moneys arising from the sale of land which was not before the sale subject to the charges, the purchased land would not be affected by the charges affecting the property settled other than the heirlooms. I think that s. 22, sub-s. 5, can be dealt with on the same footing; and, indeed, I think that was the view of Lopes L.J. in the case of the *Duke of Marlborough's Settlement*. (1) I have not forgotten that Lindley L.J. has not in his judgment expressed that view; but I do not gather from his judgment

(1) 32 Ch. D. 13.

that he intended to negative such a view. What he says, with reference s. 22, is this (1): "It is true that money arising from the sale of heirlooms is not money arising from the sale of land; and that last part of the clause therefore seems to me to be inoperative; but the effect is plain enough." I gather that what he meant was this, though of course it may be possible that I am mistaken, that it seemed to be inoperative so far as the language was concerned, but that the effect was plain enough that the section had the same effect as that given to it by Lopes L.J. Lord Esher M.R. in his judgment does not deal precisely with the point. If this be the correct view, then, as I have already pointed out, under s. 24, sub-s. 5, the question before me has been expressly provided for, and it could not possibly be contended that the land purchased in this case is subjected to the charges in question.

On both these grounds, therefore, I hold that the land is not subjected to the charges affecting the other settled land.

Solicitors: *Milward & Co., for Milward & Co., Birmingham; Solicitor to Queen Anne's Bounty.*

G. M.

FINLAY *v.* DARLING.

[1896 F. 1877.]

Marriage Settlement—Covenant to settle Wife's other and after-acquired Property—Income—Accumulations—Investment by Wife of Accumulations.

If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is invested by the wife during the coverture, the investments so made do not become subject to the covenant.

Lewis v. *Madocks*, (1803) 8 Ves. 150, (1810) 17 Ves. 48, considered.

In re Bendy, [1895] 1 Ch. 109, discussed and not followed.

SPECIAL CASE.

By an ante-nuptial settlement dated September 20, 1872, and made between James Finlay of the first part, the defendant, then Caroline Finlay, of the second part, John Darling of the

(1) 32 Ch. D. 10.

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third part, and trustees of the fourth part, certain funds became vested in the trustees upon trust to pay the income to the defendant for her sole and separate use for life, then to her husband for life, and, on the death of the survivor, upon trust for the children; and it was agreed and declared that if during the intended coverture the defendant, or the said John Darling in her right, should become seised, possessed of, or entitled to any real or personal property of the value of 200*l.* or upwards, for any estate or interest whatsoever (except jewels and other articles therein mentioned), then and in every such case such property should be vested in the trustees of the settlement upon the trusts therein declared.

James Finlay, the father of the defendant, by his will dated November 18, 1880, devised and bequeathed to the trustees of his will all the residue of his real and personal estate upon trust for conversion and investment, and to hold the same in trust for his children as therein mentioned. And the testator declared that as to the share of each daughter the same should not vest in her as her absolute property, but that his trustees should raise and pay her out of such share the sum of 1000*l.* for her sole and separate use, and should stand possessed of the residue of such share upon trust to pay the income thereof to her for life for her sole and separate use independently of any husband, with a restraint on anticipation.

Upon the death of James Finlay in 1881, the sum of 1000*l.* so bequeathed to the defendant by his will was paid to and received by her; and she also received the income arising from her share of his residuary estate, amounting to 630*l.* per annum or thereabouts.

The income of the funds subject to the trusts of the settlement received by the defendant amounted to 650*l.* per annum, or thereabouts.

The defendant from time to time invested in her own name in certain stocks, shares, and securities considerable sums of money, amounting at the several times of investment to over 200*l.*, and being portions of the income derived by her under the said will and settlement, and accumulations of the income derived by her from such investments.

The said John Darling was still living, and there were seven children of the marriage, all of whom were living. The plaintiffs were the present trustees of the settlement.

The question was whether the investments made by the defendant of income received by her under and by virtue of the trusts of the will and settlement were subject to the trusts of the settlement.

Henry Terrell, for the plaintiffs, contended that the investments of the income were bound by the covenant to settle after-acquired property, and relied upon the decision of Kekewich J. in *In re Bendy* (1) and on *Lewis* v. *Madocks*. (2)

John Dixon, for the defendant, was not called upon.

ROMER J. The question before me concerns some accumulations of income of a lady under her marriage settlement which she appears to have invested. The question is whether those investments are now subject to the covenant to settle after-acquired property contained in the settlement.

When I look at the wording of the covenant in this settlement, I think it is reasonably clear that it was not intended to bind any income that the lady should receive from the settled property. I think also it clearly was not intended to apply to any capital moneys or property that should come to her after the date of the settlement of a less value than 200*l*. The question before me does not concern any capital moneys coming to her of a less sum than 200*l*. Now, if income which the lady receives from the settled funds and property is not bound by the covenant (and it is clear the income is not), it appears to me on principle not right to hold that, merely because the lady does not choose at once to spend that income but accumulates it, either in her purse or at her bankers, she renders that liable to be bound by the covenant which was not bound before. If one half-yearly income she received was not bound, I fail to see why, after several years' receipts of half-yearly income, when the money she had not spent of that income remained in her hands and exceeded 200*l*., I should hold that that accumulated

(1) [1895] 1 Ch. 109. (2) 8 Ves. 150; 17 Ves. 48.

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income passed from her and went to the trustees of the settlement. In my opinion that is not the meaning or intent of the covenant here; and on principle I think that the covenant ought not to be extended to that. If the accumulations in her hands or at her bankers are not held to be bound by the covenant, I fail to see on principle why I should hold the money bound when it becomes invested by her in some investment such as Consols or the like. If the money was not bound by the covenant, I fail to see on principle why the investment should be bound.

Now, that being my view of the operation of this covenant, and the principle, as it appears to me, clearly pointing to the property not being bound, am I compelled by the authorities to hold that I must give to this covenant an operation which, in my opinion, it ought not to have? I think not. The only cases which have been cited which at all concern the case before me are two. The first is the case before Lord Eldon L.C. of *Lewis* v. *Madocks*. (1) But that case when examined will be seen to have been a decision on a covenant of a substantially different character. It was a simple covenant by a man on his marriage that he would settle the whole of his personal estate, however acquired; and to a covenant of that kind different considerations might apply. Lord Eldon pointed out in that case even that income which the husband received would not be bound by the covenant; but he did say that if that income became capital, then the capital that accrued to him would be bound. I do not know that that decision went so far as that, but certainly there is a statement of Lord Eldon to that effect. In the first place, I think that his observation must have been limited in its application to the case immediately before him, which, as I pointed out, concerned and dealt with a covenant of a substantially different kind from the covenant before me; and, secondly, I am not sure that Lord Eldon did not mean by the word "capital" capital which was so held by the husband as to shew that he intended it to become part of his personal estate which was bound by his covenant. Whether that be so or not, his observation referred to a covenant of a different

(1) 8 Ves. 150; 17 Ves. 48.

kind, and does not, I think, bind me here. And even if his observation did to any extent bind me here, I should have to see what the circumstances of the case before me were. Now all that this special case tells me is this, that the lady having received income has not spent it, but has invested it. I should decline, in the case before me, from that fact, to draw any inference that the lady had ceased to retain her hold over the investments—had ceased to regard it as her accumulated income which she could deal with as she chose as part of her income. She might well have intended it as an interim investment, for example. She might well have intended to retain the control over it, so that she might be able to retain it and spend it as occasion required. I should decline to hold, from the mere fact of her having invested her accumulated income, that she had parted with the right to deal with it still as accumulated income if she thought fit. It was suggested, on behalf of the plaintiff, that a further inquiry might be necessary. As I have already said, I myself should be disposed to hold that these investments were not bound by the covenant irrespective of intention. But I cannot conceive, if the lady were asked, that she would not say, with regard to these investments, that she intended to retain full control over them, and intended to apply them as and when she thought fit for her needs; and, if she said so, there would be an end of the matter. At any rate, on this special case I feel convinced I ought not to hold that the investments are bound by the covenant.

The only other case that has occasioned me any difficulty is that before Kekewich J. of *In re Bendy*. (1) That is a decision of a judge of first instance like myself. Ordinarily, in these cases, I should always follow the decision of a judge of co-ordinate jurisdiction, unless on principle I differed from it. If the report of *In re Bendy* (1), as given in the LAW REPORTS, shews all that existed in that case and be correct, then I feel bound to say, speaking with great deference, that I do not follow it, and that, if that case had come before me, I should not have decided that way. I cannot help thinking there must have been some circumstances which do not appear in the

(1) [1895] 1 Ch. 109.

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report which led to the decision in that case; for I notice that the learned judge decided, as reported, that property which was expressly excepted from the marriage settlement, and was the lady's own, having been sold by her and the proceeds invested in another property, the new property at once became subject to the trusts of the settlement. I do not follow that, and, as I have said, I think there must have been some circumstances not appearing in the report which led to that decision. But, be that so or not, entertaining myself a clear opinion on a question of principle and as to the effect of the covenant before me, I feel bound to follow my own view, and decide that these investments of accumulated income are not bound by the covenant in question.

Solicitors: *Pitman & Sons, for H. Russell, Lichfield; Rowcliffes, Rawle & Co.*

G. M.

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Canal—Right to Support—Subjacent and Adjacent Minerals—Working—Undertaking not to Sue.

The defendants' canal was constructed under an Act of Parliament by which the canal was to be open for use by the public on payment of tolls. Two sections of the Act (37 and 38) were identical in effect with the statutory provisions construed by the House of Lords in *Knowles & Sons* v. *Lancashire and Yorkshire Ry. Co.*, (1889) 14 App. Cas. 248, and *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564.

By s. 37 nothing therein contained was to affect the right of any owner of land to the mines and minerals under the lands to be made use of for the canal, but it should be lawful for him to work the same, not thereby injuring, prejudicing or obstructing the canal.

By s. 38, if the mine-owner should in pursuing the mines work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the mine-owner to endanger or damage the further working thereof, it should be lawful for the company to treat and agree with the mine-owner for all minerals near or under the canal which should be thought proper to be left for the security of the canal or mines, and in case of disagreement, then, upon the request of either the company or the mine-owner, the amount of satisfaction should be assessed, and upon payment thereof the mine-owner should be perpetually restrained from working the mines within the limits for which satisfaction should be given.

Plaintiffs were the owners of coal-mines under the canal and the lands on both sides of it, and, being advised that if they continued their workings within certain limits on both sides of the canal they would damage it, they gave the defendants (who had succeeded to the rights and obligations of the canal company) notice of their intention to work the subjacent and adjacent coal, and requiring them to treat for the coal necessary to be left for the security of the canal. The defendants replied that no coal need be left, and declined to treat.

Plaintiffs then sued defendants for—(*a*) a declaration that they were entitled to work all their adjacent coal, although the result might be to endanger or damage the canal, or, in the alternative, (*b*) a declaration that plaintiffs were entitled to be paid, under s. 38, satisfaction for adjacent coal left as canal protection. Plaintiffs also claimed a declaration that under ss. 37 and 38 they were entitled to be paid satisfaction for the subjacent coal left as protection:—

Held, that the plaintiffs were entitled to declaration (*a*), but that on

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the plaintiffs and defendants making admissions (substantially to the effect of the referee's findings in the *Chamber Colliery Case*, see [1894] 2 Q. B. 635) that the cost, if any, of repairing damages to be sustained to the canal and works by getting all the coal would be trifling compared with the value of the coal required to be left for the absolute protection of the canal and works, and that such damage could be repaired from time to time, and would not interfere with the navigation, and on the defendants undertaking (substantially in accord with the undertaking required by the Court of Appeal in the *Chamber Colliery Case*, [1894] 2 Q. B. 632, 642) not to claim damages in the future in respect of the plaintiffs working the subjacent coal, and at their own expense to repair any damage thereby caused, the plaintiffs were not entitled to any declaration respecting the subjacent coal.

THE defendants were the owners of the Ashton-under-Lyne Canal, and the plaintiffs were the lessees of and were working seams lying beneath the canal and under the lands on both sides of it.

The canal was made under an Act of Parliament passed in 1792 (32 Geo. 3, c. 84), the material provisions of which were as follows:—

Sect. 37: "Provided always, and be it further enacted, that nothing herein contained shall extend to defeat, prejudice, or affect the right of any . . . . owner or owners of any lands or grounds in, upon, or through which the said intended canal or any towing-path, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid shall be made to the mines and minerals lying and being within and under the lands or grounds to be set out or made use of for such canal [&c.]; but all such mines and minerals are hereby reserved to such . . . . owner or owners of such lands or grounds respectively, their heirs, executors, administrators, and assigns respectively; and it shall be lawful for . . . . such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained) to work, get, drain, take, and carry away to his, her, or their own use such mines and minerals, not thereby injuring, prejudicing, or obstructing the said intended canal [&c.] anything herein contained to the contrary notwithstanding."

Sect. 38: "Provided also, and be it further enacted, that if the owner or worker, owners or workers of any coal or other

mine or mines shall in pursuing such mine or mines work near or under the said intended canal or other works as aforesaid, so as in the opinion of the said company of proprietors to endanger or damage the same, or in the opinion of the said owner or worker, owners or workers of the said mine or mines to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with the owner or worker, or owners or workers, for all such coal or other minerals as may be near or under the said intended canal or other works as shall be thought proper to be left for the security or preservation of the said intended canal, or works, or mine or mines as aforesaid; and in case the said company of proprietors and such owner or worker, or owners or workers of such mine or mines shall disagree in the satisfaction to be made for such coal or other minerals," a jury was to be summoned, as pointed out in the Act, "at the request of the said company of proprietors or of such owner or worker, owners or workers of such mine or mines . . . . to assess and determine what satisfaction such owner or worker, owners or workers of such mine or mines ought to have and receive from the said company of proprietors on being restrained from working such mine or mines; and upon payment or satisfaction made to such owner or worker, owners or workers of such mine or mines by the said company of proprietors according to the verdict or judgment of such jury, such owner or worker, owners or workers of such mine or mines shall be, and they are hereby perpetually restrained from working such mine or mines within the limits for which satisfaction shall by the said jury be adjudged and declared to extend."

By s. 73 the canal was to be open to the public on payment of certain tolls and subject to certain regulations.

By 39 & 40 Geo. 3, c. 24, s. 11, power was given to the company of proprietors to refer any of the above-mentioned questions, matters, and differences to arbitration. By 11 & 12 Vict. c. 86, the canal, with the towing-path and other works and the liabilities of the company of proprietors in connection therewith, were vested in the defendants.

The plaintiffs in working their mines were approaching the

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canal, and alleged that if they continued the working within certain limits extending on both sides of the canal they would endanger or damage the canal, towing-paths and works.

The plaintiffs in the ordinary course of working would take out all the coal in both mines extending along the canal for 1500 yards and extending both under and on the sides of the canal, but they were advised that as regards the *subjacent* coal—namely, that lying under the canal, towing-paths and works—they were bound to leave sufficient coal to support the same, and were entitled to compensation for the coal left. As regards the *adjacent* coal—namely, that which did not lie vertically under the canal, towing-paths and works, but under adjacent lands, and which was necessary to be left for the support of the canal, towing-paths and works—the plaintiffs claimed to be entitled to get the coal, notwithstanding danger or damage might ensue, or that, if not so entitled, they were entitled to compensation from the defendants for the *adjacent* coal left as a support.

The plaintiffs served the defendants with notice of their intentions as to both the adjacent and subjacent coal, and requiring them to treat for the coal necessarily left as a support; but the defendants declined so to treat.

In the present action the plaintiffs claimed as follows: "(1.) a declaration that they are entitled to work and get the whole of the coal and other minerals belonging to the plaintiffs which may lie within and under any land *adjacent* to the said canal, towing-paths and works, notwithstanding that the working or getting thereof may endanger or damage the said canal, towing-paths and works; or, in the alternative, (2.) a declaration that the plaintiffs are entitled to be paid by the defendants pursuant to the said first-mentioned Act, s. 38, satisfaction for all such part or parts of the said last-mentioned coal and minerals as may be proper to be left for the security or preservation of the said canal, towing-paths and works, or any of them; (3.) a declaration that the plaintiffs are entitled to be paid by the defendants pursuant to the said first-mentioned Act, ss. 37 and 38, satisfaction for all such part or parts of the coal and other minerals belonging to the plaintiff and *lying under* the said

canal, towing-paths and works as may be proper to be left for the security or preservation of the said canal, towing-paths and works, or any of them ; (4.) that the defendants may be ordered to take all steps necessary to be by them taken for the purpose of ascertaining all such satisfaction as aforesaid, and to pay to the plaintiffs the amount thereof when so ascertained."

Joseph Walton, Q.C., and *O. L. Clare*, for the plaintiffs. Sects. 37 and 38 of the Act of 1792 are different from the provisions of the Railways Clauses Act, 1845, but are practically identical with statutory provisions which have been construed in *Lancashire and Yorkshire Ry. Co.* v. *Knowles & Sons* (1) and in *Chamber Colliery Co.* v. *Rochdale Canal Co.* (2)

Sect. 37 of the Act in this case is like s. 37 of the Act in *Knowles' Case* (1), and like s. 39 of the Act in the *Chamber Colliery Case* (2) ; and s. 38 of the Act in this case is like s. 38 of the Act in *Knowles' Case* (1), and like s. 40 of the Act in the *Chamber Colliery Case.* (2)

The Acts do not contemplate that at the time when the canal company take the surface it shall pay compensation for the mines underneath ; but they in effect prohibit the working of the subjacent coal, while they provide for compensation being given for both subjacent and adjacent coal left to support the canal and works.

In *Knowles' Case* (1) the coal in question was both subjacent and adjacent. The mine-owners gave notice of their intention to work the coal, but the railway company declined to pay compensation. The coal was then worked, with the result that the canal was damaged, and the House of Lords held that the mine-owners were entitled to compensation for minerals left for support, but liable in damages for the injury to the canal, notwithstanding the refusal to compensate.

In the *Chamber Colliery Case* (2) the mine-owners had only the adjacent mines, as it ultimately turned out, and it was held that they were under no statutory liability to the canal company

(1) (1887) 20 Q. B. D. 391; on appeal sub nom. *Knowles & Sons* v. *Lancashire and Yorkshire Ry. Co.*, (1889) 14 App. Cas. 248.

(2) [1894] 2 Q. B. 632; on appeal [1895] A. C. 564.

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for working them, and that if the working would not injure the mines, though it would damage the canal, the mine-owners could not insist under s. 40 against the will of the company on minerals being left for support and compensation being paid for them, the canal company being willing that the working should take place. It is clear, therefore, that we cannot get the subjacent coal without responsibility, and yet the defendants say they are not liable to compensate us for it.

Sect. 37 of the defendants' Act enables the mine-owner to work the subjacent and adjacent mines so long as he does not injure the canal. Sect. 38 of the defendants' Act means that if any mines are worked under or near the canal (*a*) so as in the opinion of the company to endanger the canal, or (*b*) so as in the opinion of the mine-owner to endanger the mine, then, unless it is agreed what coal is to be left as support, a jury is to say what coal is to be left—this is not said but obviously involved—and what is to be paid for the coal so left to avoid the injury feared.

In *Knowles' Case* (1) the special case states that the defendants, before they worked part of the subjacent and adjacent mines, gave notice to the plaintiffs of their intention to work, and that the defendants declined to purchase or compensate for leaving either subjacent or adjacent support, that statement being inserted in view of *Dudley Canal Navigation Co.* v. *Grazebrook.* (2) The decision of the Queen's Bench Division in *Knowles' Case* (3) proceeded entirely on s. 37, namely, that the mine-owner may work, but must not damage the canal, and that if there is damage he must pay for it.

In the Court of Appeal (4) the only question was whether the mine-owner was liable under s. 37, and it was held that he was, and that this was no great hardship because he might have got compensation under s. 38. When *Knowles' Case* (5) reached the House of Lords, the decision was that the liability imposed on the mine-owner to pay for damage caused by working continues until he protects himself by taking the

(1) 20 Q. B. D. 394.
(2) (1830) 1 B. & Ad. 59.
(3) 20 Q. B. D. 391.
(4) Ibid. 402.
(5) 14 App. Cas. 248.

course prescribed by the Act, which course enables him to obtain full satisfaction for all the minerals which he is compelled to leave unworked. In the *Chamber Colliery Case* (1) there was adjacent coal only, it being ultimately held that the subjacent coal did not belong to the mine-owners. The mine-owners gave notice to treat; but as the canal company took no steps, an action was brought for a declaration that the mine-owners were entitled to have compensation assessed and paid for the minerals left for protection. The action was ordered to be referred to a referee; but before this order was made the defendants wrote that they "were willing that the plaintiffs should get the whole of the coal in question, and to covenant that the defendants should not be entitled to make any claim against the plaintiffs in respect of any consequent damage to the canal." (2) The referee found that the working would not injure the mines, but would cause a subsidence slightly injuring the canal, and he directed certain coal to be left as support and assessed the compensation for it. The Queen's Bench Division affirmed this finding (3); but the Court of Appeal held that on the defendants giving an undertaking in the terms of their offer, the plaintiffs were not entitled to have the compensation assessed. (1)

[*Cozens-Hardy, Q.C.* We are willing to give that undertaking.]

In the House of Lords, in the *Chamber Colliery Case* (4), some doubt was expressed as to the legality of such an undertaking. But the House decided that s. 39 (in this case 37) did not apply to adjacent mines, and that if working them would not endanger the mines, though it would damage the canal, the mine-owner could not insist on leaving adjacent minerals and being compensated for them, if the canal company were willing that they should work as they pleased, and preferred to repair the canal to paying compensation.

In other words, the Court of Appeal held that the action would lie as to the adjacent mines, but that the offer was a defence to it. The House of Lords thought the offer was no

(1) [1894] 2 Q. B. 632.
(2) Ibid. 635.
(3) [1894] 2 Q. B. 636.
(4) [1895] A. C. 564.

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defence so far as it was giving away a statutory protection; but that there was no statutory protection in respect of the adjacent mines—the only mines with which they had to deal.

[BYRNE J. But A. L. Smith L.J. says (1): "Had the canal-owners offered the undertaking . . . . before action brought I should have said . . . . that the plaintiffs' action had failed, and should have been dismissed with costs." That is a decision upon the undertaking.]

Yes, so far as it is not qualified or disapproved in the House of Lords.

[BYRNE J. I do not understand that the House of Lords actually gave a decision as to the undertaking.]

There are observations on the point in the speech of Lord Herschell (2), and in the speech of Lord Macnaghten (3); and see also the observations of Lord Watson. (4) Therefore, so far as regards the subjacent mines, there are dicta in the House of Lords against the validity of an undertaking like that sanctioned in the Court of Appeal.

[BYRNE J. There does not seem to be any decision on the point.]

Then we shall be content with this Court's decision.

[*Cozens-Hardy, Q.C.* Then we will undertake that, in so far as the plaintiffs are prevented by the Act of Parliament from taking the subjacent minerals, to make good any damage and release them from obligation. But, having regard to the decision of the House of Lords in the *Chamber Colliery Case* (5), there is no necessity for an undertaking as to adjacent mines because we cannot recover from them if their ordinary working damages the canal.]

If the Court so decides we shall be satisfied, but we cannot do it by consent.

[BYRNE J. Having regard to the observations of Lord Macnaghten, it may be that when the mine-owner owns both subjacent and adjacent mines, the compensation section applies,

(1) [1894] 2 Q. B. 647.
(2) [1895] A. C. 573.
(3) [1895] A. C. 583.
(4) Ibid. 578, 580.
(5) [1895] A. C. 564.

and you cannot separate them. He is in the same position as the mine-owner in *Knowles' Case.* (1)]

There is a statutory right to support under s. 37 from the subjacent minerals, and no absolute right to support from adjacent minerals, but a right to ask for such support subject to the obligation of paying for it. According to the decisions, it does not depend on whether the ownership of both classes of minerals is in one person or in two. At the same time, you cannot work the subjacent coal without working the adjacent, and you begin to take away the support before you touch the subjacent. Therefore the mine-owner is entitled to come for compensation.

[They also referred to *Cromford Canal Co.* v. *Cutts* (2); *Ayr Harbour Trustees* v. *Oswald.* (3)]

Cozens-Hardy, Q.C., and *E. C. Macnaghten*, for the defendants. We say taking the coal may to some extent injure the canal bank by lowering it; but that can be set right in the ordinary course of repair, and it is not disputed that there will be no injury to the mine. The first declaration asked for is in accordance with law. There is no statutory prohibition as to working the adjacent coal, that is to say, unless the canal company wish it not to be worked, and are prepared to give compensation. The earlier section is confined to the subjacent coal: *Chamber Colliery Case.* (4) If the canal company raise no objection, the mine-owner can work out all the adjacent minerals. In *Knowles' Case* (1) there had been admittedly a breach of the statutory obligation by working the subjacent minerals so as to damage the canal; but that is not so here. And as to the adjacent mines, on the authority of the *Chamber Colliery Case* (5), this case is outside the Act altogether—no notice having been given by us under s. 38. As to the subjacent coal, we have a claim for damages if that coal is worked so as to damage the canal. But we can compromise that claim by saying, "If you will not ask us to buy the subjacent coal we will not sue for injury caused by getting it." That point was

(1) 14 App. Cas. 248.
(2) (1848) 5 Rail. Cas. 442.
(3) (1883) 8 App. Cas. 623.
(4) [1895] A. C. 564.
(5) [1895] A. C. 585.

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decided after argument by the Court of Appeal in the *Chamber Colliery Case* (1), and the decision is binding on this Court. It shews that the undertaking is not ultra vires the canal company. At the most, the House of Lords said it might be improper to force the undertaking on the canal company; and there is no question of forcing the undertaking on us here. The amount of damage is immaterial; but we can shew that here it would be trifling, as the seam is at a considerable depth, and the subsidence would not be great. There would be no difficulty in keeping the canal open as a public highway. The case is quite different from the *Ayr Harbour Case* (2), where the trustees of the statutory undertaking were attempting to bind themselves not to exercise their statutory powers. Admissions might be made in the form of the findings in the *Chamber Colliery Case*. (3) If the canal would be so injured that the navigation could not be kept open the public could interfere; but that is not the case here.

[They also referred to *London and North Western Ry. Co.* v. *Evans*. (4)]

O. L. Clare, in reply.

BYRNE J. This case is a peculiar one, in this respect—that there have already been two decisions of the House of Lords—*Knowles & Sons* v. *Lancashire and Yorkshire Ry. Co.* (5) and *Chamber Colliery Co.* v. *Rochdale Canal Co.* (6)—bearing on sections identical, or practically identical, with the sections I have to deal with in this case.

The defendants are the owners of a canal, and the plaintiffs are the owners or lessees of seams of coal, which, so far as the canal is concerned, are adjacent as well as subjacent.

There are two sections of the Act of 1792 which bear on the matter, namely, ss. 37 and 38, the former having operation only with reference to subjacent minerals, and the latter having operation with reference to working "near or under" the canal or works, and therefore having reference both to subjacent and

(1) [1894] 2 Q. B. 632.
(2) 8 App. Cas. 623.
(3) [1894] 2 Q. B. 635.
(4) [1893] 1 Ch. 16.
(5) 14 App. Cas. 248.
(6) [1895] A. C. 564.

adjacent minerals. The sections are to the same effect as those in *Knowles' Case* (1) and the *Chamber Colliery Case* (2); but in the latter case the clauses are differently numbered.

[His Lordship read the claim made in the plaintiffs' pleadings, and continued :—]

The plaintiffs allege that in working their mines they are advised, and that it is the fact, that "if they continue their workings within certain limits extending on both sides of the canal, they will endanger or damage the said canal and the towing-paths and other works belonging thereto." In the course of the case certain admissions have been made, the effect of which is to be precisely stated in writing signed by the parties; but they will be similar to certain findings in the *Chamber Colliery Case* (3), namely, to the effect that there is no reasonable ground for apprehending that the working of the mines near or under the canal will cause damage to the mines, or to the further working thereof, by percolation of water from the canal to the mines, and that the subsidence will not interfere with the navigation of the canal, but that such subsidence will necessitate repairs from time to time, during a period extending over eight or ten years, to the canal and works, and possibly to a bridge or bridges—apt words will be introduced shewing exactly what is meant. The plaintiffs are desirous of obtaining such a declaration as I have mentioned.

The defendants' contention is that that is the true position of matters, and that to make the first declaration asked for would be to declare the law applicable to the case; and the plaintiffs, in order to assist the Court—both parties being desirous of obtaining such a declaration—have taken the view for the purpose of the argument, and have fairly argued before me that that declaration ought not to be made, having regard to the decisions which have already been come to in the House of Lords. Therefore, although both parties are desirous that the same conclusion should be come to, still I have been assisted by having both views presented before me.

Now in *Knowles' Case* (1) the mine-owners were the owners

(1) 14 App. Cas. 248. (2) [1895] A. C. 564.
(3) [1894] 2 Q. B. 635.

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of subjacent as well as adjacent minerals, and it was admitted that they had been taking and working the coal from both the subjacent and adjacent mines, and had thereby injured, prejudiced, and obstructed the canal. It is clear from the construction of the 37th section of the Act in this case—and an equivalent section was dealt with in *Knowles' Case* (1)—that by working subjacent minerals the mine-owners there incurred a statutory liability in "injuring, prejudicing," and "obstructing" the canal, towing-paths, and so on. In fact, it was admitted that they injured, prejudiced and obstructed the canal. But this further had happened there—the whole of the damage had been done, and no distinction was taken, or was sought to be taken, between subjacent and adjacent minerals with reference to the relief which was sought; and the decision in that case was to the effect that the owners of the mine were entitled, having regard to their statutory liability, to have compensation under the second of the two sections, which was equivalent to s. 38 in the present case.

Sections similarly framed were again considered in the *Chamber Colliery Case* (2), which, as far as the actual decision was concerned, was a case of adjoining owners only as distinguished from subjoining owners on the one hand and owners of subjacent and adjacent coal on the other. In that case it was held that, inasmuch as no statutory liability was imposed on a mine-owner, being an owner of adjacent mines, the colliery company were not entitled to compensation under s. 40, the compensation clause of the Act in that case, which is equivalent to s. 38 in the present case.

The point I have to consider now is, whether, under the decision in the *Chamber Colliery Case* (2) a mine-owner who owns both the subjacent and the adjacent mines is entitled to come to the court and seek to be declared entitled to compensation under the compensation clause. There are certain passages in the speeches of the noble and learned Lords in the *Chamber Colliery Case* (2) which require consideration before one can come to a conclusion on that matter. If *Knowles' Case* (1) had stood alone, without the explanation given in the

(1) 14 App. Cas. 248. (2) [1895] A. C. 564.

later case of the Chamber Colliery, much more difficulty would have been presented ; but reading what was said with care, as I have read it, and after having heard the arguments on the speeches in the *Chamber Colliery Case* (1), I have come to the conclusion that the true meaning of the decision in *Knowles' Case* (2) is that it must be taken to be a decision applying to subjacent mines alone, and that it cannot be read as being a decision with respect to anything further. Lord Macnaghten, who himself made a speech in *Knowles' Case* (2) which was accepted by two others of the noble and learned Lords, also gave his reasons in the *Chamber Colliery Case* (1), and the only passage in his speech that gave me any difficulty is to be found at p. 585 of [1895] A. C. He there says: "Sect. 40 is of wider application. It enables the owner of adjacent mines, as well as the owner of subjacent mines, to obtain compensation from the canal company for the minerals which he has to leave unworked for the security or preservation of the canal or of the mines. In *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (2) it was held by this House, following the decision of Lord Cottenham in the case of *Cromford Canal Co.* v. *Cutts* (3), that the meaning was that when the working of a mine has reached a point at which the mine-owner finds that, having regard to the proximity of the canal and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine." Then he goes on to deal with the case actually before him, and he says: "Now, in this case it has been found by the award that there is no reason to apprehend danger to the mine from further working. It has, indeed, been found that the further working of the mine may injure the works connected with the canal, so as to entail upon the proprietors an outlay for some years in the way of repairs. But if the damage which may necessitate those repairs is caused by the appellants working mines, not under or within the

(1) [1895] A. C. 564. (2) 14 App. Cas. 248.
(3) 5 Rail. Cas. 442.

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lands set out or made use of for the canal, the case is outside of the Act altogether." Then his Lordship, referring to *Knowles' Case* (1), says: "It was said that the judgments of some of their Lordships went further, and laid down, or at any rate implied, that a mine-owner was entitled to receive compensation in such a case as this. But I think that there is nothing to justify this assertion. It appears to me that it was stated, carefully and clearly, that it was the apprehension of statutory liability—that is, liability for the consequences of working in contravention of the requirements or restrictions of the Act—and apprehension of statutory liability alone, which entitles the mine-owner to compensation when he cannot shew that the further working would injure his mines." Then, a little lower down he says: "No distinction was drawn between damage done by working the mine where it was underneath the canal and working where it was under adjoining land, nor was there anything to shew that there was any possibility of drawing any such distinction. The whole point of the case turned upon the question of statutory liability." Now, so far as the sections are concerned, it is with reference to subjacent mines that the statutory liability applies; and the danger of the statutory liability could only arise with reference to the owner of both subjacent and adjacent mines because he was owner of the subjacent mines. To take an illustration, if one man were the owner of the adjacent mines only, he would be under no liability whatever; and I see no fair reason for saying that because the same person is the owner both of subjacent and adjacent mines his rights are to be different with regard to the different minerals from what they would have been if they had been vested in different persons. I do not think I need dwell longer on this point now; I think the true meaning of the decision of the House of Lords in the *Chamber Colliery Case* (2) is that in cases of subjacent mines there is a right to compensation under the compensation clause, and that in case of adjacent mines there is no statutory liability.

That leaves another point for consideration in the case, which is this. There is clearly a statutory liability in respect of subjacent mines; and it has been put before me (and both parties

(1) 14 App. Cas. 248. (2) [1895] A. C. 564.

are desirous that I should take that view if possible) that an undertaking can be given by the defendants that they will not insist upon a remedy, which they might otherwise have had, in damages, by reason of injury caused by working the subjacent mines; and upon that I am asked not to make the declaration, sought by the statement of claim, that the plaintiffs are entitled to compensation in respect of the subjacent mines. Admissions have been made by the parties, which I have before referred to, and which will be entered in the order; and the effect of these admissions is amongst other things to shew—and both parties are agreed about this, it being in accord with what their scientific advisers tell them—that the damage that will be caused will be very trifling compared with the compensation which would have to be paid if the minerals had to be left. Therefore they say they bring themselves within the same category as the parties in the *Chamber Colliery Case*, or rather within the principle of the decision by the Court of Appeal in that case. (1) There, the undertaking having been offered and it having been found that the injury to be suffered would require something like 1200*l.* spread over eight or ten years, or a considerable number of years, to repair, and that the amount of compensation to be paid to the mine-owners would be 12,000*l.* or thereabouts, and an offer having been made not to sue in respect of injury done with respect to the getting of the minerals, the Court of Appeal thought that that was sufficient, and in fact rather forced it upon the parties, and said that that was a sufficient offer to make, and that the mine-owner ought to be bound to accept it. In fact, one of the judges, I think, said that if that offer had been made before action, he thought the action ought to have been dismissed with costs. There are certain dicta on the appeal to the House of Lords in the *Chamber Colliery Case* (2) pointing to this: that more consideration in respect of that matter might have been required had it really arisen before them; but what was said does not come to more than that. I have the decision of the Court of Appeal as a standing decision, and I am not at all prepared to say the noble and learned Lords would have decided

(1) [1894] 2 Q. B. 632. (2) [1895] A. C. 564.

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otherwise had the question been argued out before them. On the contrary, the dicta are consistent with their having taken either view. However, one of the parties whose duty it would have been to argue the point was not concerned to do so, and at present the decision of the Court of Appeal stands. But I am not asked to do what was done there; I am only asked to make an order having regard to the undertaking offered, anxiously offered, by the one party, and not forcing it on the other party, and I think I may do so having regard to the admissions that have been made.

I do not think I have passed over any matter material to be considered. I have been more careful—because I was fairly told that this decision was what both parties desired—to see that I was not overlooking any point that might tell in the opposite direction; but I do think I am justified in making such a declaration as is asked for with reference to the adjacent mines. There will be a declaration, but the order will be prefaced by the undertaking that has been mentioned, and the admissions that have been made will be mentioned in the order also.

The remaining question is one of costs. I understand the defendants are not willing to forego their right, which in this particular case is to say to the plaintiffs, "You come here asking for a declaration which we say represents the law, and you need not go to the Court for such a declaration." With regard to the second part of the case, I think that the plaintiffs would have been entitled to some relief in respect of the subjacent coal; and therefore I think, having regard to the whole of the circumstances, and to the fact that it would not be worth splitting the costs in the case, that justice would be fairly met by saying no costs. But the plaintiffs may take an inquiry what damages (if any) they are entitled to by reason of the delay in working the subjacent coal, and the costs of that inquiry will be reserved.

Solicitors for plaintiffs: *Flower, Nussey & Fellowes, for Killick, Hutton & Vint, Bradford.*

Solicitors for defendants: *Cunliffes & Davenport, for R. Lingard-Monk, Manchester.*

F. E.

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March 3, 4.

In re SCOWBY.
SCOWBY *v.* SCOWBY.

[1891 S. 1702.]

Administration Action—Practice—Costs — Order for Payment—Defaulting Trustee—Supplemental Order—Jurisdiction — Extravagant Litigation — Disallowance of Costs.

Though the Court has no jurisdiction to alter or vary an order after it has been passed and entered, yet it may make a supplemental order; such as an order directing that the party benefited by the previous order shall not be entitled to receive any benefit under it except on certain conditions.

In an administration action an order was made in 1887 directing the trustees to raise a sum of taxed costs which they had incurred to their solicitor and to pay into court the amount when raised. The trustees raised the amount but, instead of paying it into court, allowed their solicitor to retain it in payment of his costs, although no order for actual payment had been made. In 1892 the trustees obtained orders directing certain further costs to be taxed and paid to them, and those orders were duly passed and entered; but before they had been acted upon Kekewich J. was informed of the default of the trustees under the order of 1887, and moreover that the taxed costs directed to be raised by that order amounted to about one-third of the value of the whole estate, and had mostly been incurred in fruitless and unnecessary proceedings carried out under the advice of the trustees' solicitor. He accordingly made an order supplemental to the orders of 1892, directing that, although the taxation of costs under those orders should be proceeded with, none of those costs should be paid to the trustees until they had first complied with the order of 1887. On appeal that supplemental order was affirmed.

Observations on the jurisdiction of the Court as to disallowing costs improperly incurred in an administration action.

Brown v. *Burdett*, (1887) 37 Ch. D. 207, discussed.

Francis Scowby, who died on February 15, 1869, by his will gave all his property, real and personal, to his wife Ann Scowby, Isaac Lee, and another, upon trust for his said wife for life, and after her death upon trust, as to certain specific house property and personal estate, upon trusts for the benefit of his nephew George Scowby and his children; and as to certain other specific house property upon trusts for the benefit of his nephew Richard Scowby and his children; with a gift over, in the event of either nephew dying without children, to the other nephew and his children.

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Ann Scowby, the testator's widow, died on February 16, 1879.

In April, 1883, an action of *In re Scowby, Scowby* v. *Lee* [1883 S. 1842] was brought for the administration of the testator's estate, the plaintiffs being the infant children of Richard Scowby (who was then dead) together with George Scowby, and the defendant being Isaac Lee, the then sole surviving trustee of the will. That action was instituted on the advice of Mr. Dalton Miller, a solicitor consulted by Mrs. Mary Scowby, the widow of Richard Scowby and the mother of the infant plaintiffs.

In the previous month of March, 1883, an action had been brought, also under Miller's advice, by the infant children of Richard Scowby against the lessees of a small public-house in Wakefield called the White Swan, forming the principal part of the property given to Richard Scowby and his children. That action, which was to set aside the lease, had been commenced in the Chancery Division, but was transferred for trial to the Queen's Bench Division. Before the trial a compromise advantageous to the plaintiffs was offered by the defendants, but the offer was refused by Miller on behalf of the plaintiffs, without its having been in any way brought to the notice of the Court in the administration action, although in January, 1884, Miller applied for and obtained leave to carry on the Queen's Bench action.

The Queen's Bench action proceeded to trial, resulting in a verdict for the defendants.

At the instance of the plaintiffs the Divisional Court ordered a new trial, but on appeal that order was discharged, the Court of Appeal sustaining the original verdict. The Master of the Rolls, however, described the litigation as deplorable and ill-advised. A fresh action was subsequently brought in the Queen's Bench Division by the lessees of the White Swan against Mrs. Scowby to recover possession, but was settled upon terms sanctioned by the judge in the administration action.

In December, 1885, Lee was induced to retire from the trusteeship, and by an order made by Bacon V.-C. in chambers Mary Scowby and her brother John Coward (a man in poor

circumstances and entirely under Miller's control) were appointed new trustees of the will, and they were duly made defendants in the administration action. The usual judgment for administration having been pronounced in that action, the chief clerk, by his certificate dated December 23, 1886, certified as to the several properties specifically given in favour of George Scowby and his children, and in favour of Richard Scowby and his children, their values being ascertained at 4343*l.* and 4866*l.* respectively.

On February 8, 1887, Kay J. made an order, on the further consideration of the administration action, directing the taxation, as between solicitor and client, of the costs of the plaintiffs and defendants, including therein the costs of the Queen's Bench actions, with directions that the several properties specifically given should contribute rateably to such costs when taxed; with liberty to apply in chambers as to raising such costs.

By his certificate dated July 11, 1887, the taxing master certified the taxed costs under that order at 3586*l.*, nearly the whole of which was payable to Miller as solicitor to the defendants Mrs. Scowby and Coward, the trustees of the will, the rest being payable to the solicitor to the defendant Isaac Lee, the late trustee.

By an order in chambers, dated July 22, 1887, purporting to be made by Kay J., on the adjourned further consideration of the administration action, it was directed that the proportions (therein specified) of the certified taxed costs attributable to the several properties specifically given by the will should be raised by the trustees, Mary Scowby and John Coward, out of the several properties in manner therein mentioned, namely, as to 1898*l.* by a mortgage of the White Swan public-house, and as to the residue out of the personal property given to George Scowby and his children; and that they should pay the money so raised into Court to a "costs account"; liberty being given to any of the parties to apply.

Thereupon the trustees, Mrs. Scowby and Coward, under Miller's direction, proceeded to raise the 3586*l.* as follows. They granted a legal mortgage to one Clarke of the White

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Swan for 1600*l.*; and to supply the residue of the 1898*l.* costs attributable to Richard Scowby's share they sold personal property belonging to George's share. To replace what they so took they, as trustees of Richard's share, executed a second mortgage of the White Swan to themselves as trustees of George's share, in which they went through the formality of conveying the property by themselves to themselves subject to a proviso for redemption on payment by themselves to themselves; and they covenanted with themselves for payment of principal and interest to themselves. The amount of the mortgage money was, however, left in blank. To make up the amount of costs attributable to George's share they sold personal estate, part of that share. A third mortgage similar in form to that last mentioned was prepared and engrossed for execution by the trustees to secure a further sum taken from George's share for purposes of Richard's property. This last mortgage was never executed, but the engrossment bore the signature of the then chief clerk, Mr. Harwood Clarke, as having been approved by Kay J.

On December 29, 1887, Miller took out a summons in chambers on "adjourned further consideration" on prepared minutes annexed, these minutes proposing that the costs directed to be raised by the order of July 22, 1887, should be paid to him direct instead of into court as required by that order. This summons came before Mr. Harwood Clarke on January 2, 21, and May 31, 1888, when he appeared to have made a note upon it directing an "order as in the minutes annexed," but no order on the summons was ever actually drawn up. However, the money raised for costs as above mentioned was never paid into court, and it appeared that the whole of it, with the exception of a small sum due to the solicitor of the defendant Lee, was received by Miller and retained by him in discharge of his costs.

In November, 1890, Mrs. Scowby, one of the trustees, was adjudicated bankrupt. In December, 1890, Miller took out an originating summons before Kekewich J. (to whose branch of the court the original administration action of 1883 had been assigned) in the name of the infant children of Richard Scowby,

by John Coward as their next friend, as plaintiffs, Coward being also a plaintiff and suing as trustee, against Mrs. Scowby as defendant, and intituled also in the matter of the administration action of 1883, asking for the appointment of two new trustees of the will of Francis Scowby, for a receiver, and administration of the estate so far as necessary.

In January, 1891, and before any further steps had been taken under the last-mentioned summons, Mrs. Scowby, becoming dissatisfied with Miller's conduct as her solicitor, consulted a new firm of solicitors, though Miller still continued to act as Coward's solicitor. In April, 1891, Mrs. Scowby's new solicitors, in consequence of her being a bankrupt, and considering that Coward was an unfit person to continue a trustee, commenced an action by originating summons, *In re Scowby, Scowby* v. *Scowby* [1891 S. 1702], in the name of the infants, by a next friend, other than Coward, as plaintiffs, against Mrs. Scowby and Coward as defendants, and intituled in the matter of the administration action of 1883, asking for the appointment of new trustees of the will in the place of Mrs. Scowby and Coward, and, so far as necessary, administration of his estate. That summons and that of December, 1890, were brought on together before the chief clerk, Mr. Harwood Clarke, but were adjourned into Court before Kekewich J., who ultimately, on February 4, 1892, made an order on the summons of 1890, appointing Samuel Wainwright Witham and Charles Graham trustees in the place of Mrs. Scowby, the bankrupt trustee, and in addition to Coward, the continuing trustee, and directing the taxation and payment out of the trust estate of certain costs to Mrs. Scowby and also to Coward, but disallowing Miller, the solicitor to the applicants, all other costs of that summons as between himself and his clients. On July 10, 1892, Miller died, and his estate was now being administered before North J. Coward subsequently consented to retire from the trusteeship of the will of Francis Scowby, and by an order made on December 23, 1892, in the administration action of 1891, William Norwood was appointed trustee in his place and jointly with Witham and Graham; and the defendants Mrs. Scowby and Coward were thereby ordered to transfer the trust estate to those three trustees; and certain

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costs were thereby directed to be taxed and paid to Mrs. Scowby and Coward by the new trustees out of the trust estate. When that order, and also the previous order of February 4, 1892, were made, the fact that Mrs. Scowby and Coward were in default in not having made the payment into court directed by the order of July 22, 1887, was not brought to the attention of the Court. Both the orders of 1892 were duly drawn up and entered, but the taxation directed by them had not yet been proceeded with. Coward, however, refused to comply with the order of December 23, 1892, for transfer of the trust estate to the three new trustees except on payment of the costs, amounting to about 200*l.*, which he said were due to him under that and the previous order of February 4, and were claimed by the estate of his late solicitor, Miller, and by his present solicitors. The new trustees, however—who had, by order, been added as defendants to the administration action of 1891—having come to the conclusion that Coward had, either directly or as the tool of Miller as his solicitor, caused the trust estate to be wasted to the extent of upwards of 3500*l.* by costs of litigation incurred unnecessarily and carried on in an extravagant manner, took out a summons on June 15, 1896, in the administration action of 1891, asking that, notwithstanding the orders of February 4, 1892, and December 23, 1892, all costs thereby respectively directed to be taxed and paid in favour of Miller might be disallowed. The summons was supported by an affidavit by a member of the applicants' firm of solicitors to the effect that, as the result of his investigations, he had come to the conclusion that none of the actions brought at Miller's instigation had been commenced or defended bonâ fide for the benefit of the infants; that the consequences of the litigation had been most disastrous, the only results having been the incurring of enormous costs and the substitution of two incompetent trustees, Mrs. Scowby and Coward, for an independent and apparently trustworthy trustee, Isaac Lee. The summons was adjourned into Court and argued on December 15, 16, and 17, 1896, when the whole of the facts relating to the administration of the estate were publicly brought to the attention of the judge. In delivering judgment Kekewich J. held that Mrs.

Scowby and Coward were clearly still under liability to pay into court the sums they had been directed to pay in by the order of July 22, 1887, and that although he could not vary the orders of February 4 and December 23, 1892, yet he could make a supplemental order directing the present trustees of the will not to make any payment to Mrs. Scowby and Coward of the costs directed to be taxed and paid under those orders until the previous order of July 22, 1887, had been complied with; and his Lordship accordingly made an order that the taxation of costs directed by the orders of February 4 and December 23, 1892, should proceed, but that the applicants, the trustees, were not to pay any of the costs of the defendant Coward or of the defendant Mrs. Scowby under those orders until the moneys directed to be paid into court by them pursuant to the order of July 22, 1887, should have been paid in; the costs of the present application being reserved, with liberty to apply and to appeal. The defendant Coward appealed against this order so far as it directed the present trustees not to pay any of the costs of himself or of the defendant Mary Scowby directed to be taxed and paid under the two orders of February 4, 1892, and December 23, 1892, until the order of July 22, 1887, had been complied with.

Bramwell Davis, Q.C., and *Dunham*, for the appellant. First, the present trustees have shewn great delay in making this application. The orders for taxation and payment of the costs which Coward now claims were made as long ago as 1892, and Miller died in the same year, whereas this application was not made until four years afterwards, a delay which has necessarily added to the difficulties of investigation. What these trustees should have done, if they thought the costs taxed under the order of July 22, 1887, excessive, was to have applied for an inquiry under Order LXV., r. 11, as was directed in *Brown* v. *Burdett*. (1) Then the order of Kekewich J. now appealed from is open to the objection that it is virtually altering or varying the previous orders of February 4 and December 23, 1892, orders which have already been passed and

(1) 37 Ch. D. 207.

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entered, and which directed the costs therein mentioned to be taxed and "paid." The learned judge had no jurisdiction to make an alteration of those orders. His present order was made on the ground that the late trustees, Coward and Mrs. Scowby, were "in default" through their not having paid the money raised for costs into court pursuant to the order of July 22, 1887. But they acted, as they considered themselves entitled to do, under the sanction of the chief clerk, and therefore we submit that they were not really in default at all. But if there was a default, it is merely technical; for, in paying to Miller direct the costs to which he was entitled under the order of July 22, 1887, and which had been duly taxed, they were only anticipating an order which would have been made after the money ordered to be raised for costs had been brought into court. Accordingly the order appealed from is wrong because it was made on a mere technical ground upon which it would be unjust to deprive Coward of the costs he has been declared to be entitled to by the orders of February 4 and December 23, 1892.

Warmington, Q.C., and *H. M. Humphry*, for the respondents, the present trustees of the will. Without imputing personal misconduct to the late trustees, Coward and Mrs. Scowby, we submit that their conduct in not having taken proper steps to protect the estate, in their having left everything to Miller, and in their having enabled him to get this large sum of money into his hands, and so withdraw it from the control of the Court, amounted to a breach of trust. The fact of their having allowed Miller to prepare, and to induce them to execute, a mortgage of the public-house by themselves to themselves, with the amount of the mortgage money left in blank to be filled in by Miller as he thought fit, is enough to convict those trustees of gross negligence, and Coward is not therefore entitled to any consideration. As to the argument that the order appealed from is a variation or alteration of the two orders of 1892, and that therefore the learned judge below had no jurisdiction to make it, the answer is that it does not in fact vary or alter those orders at all: it is nothing more than a supplemental order, which is an order the Court has jurisdiction to make:

Preston Banking Co. v. *William Allsup & Sons.* (1) We submit therefore that the appeal should be dismissed: and that, if necessary, a reference should be directed to the taxing master under Order LXV., r. 11, for inquiry and report, as in *Brown* v. *Burdett.* (2)

Bramwell Davis, Q.C., in reply. Order LXV., r. 11, applies only to a personal claim as against a solicitor on the ground of negligence or misconduct. In such a case, no doubt, the Court can call upon him to explain his conduct, but an order for that purpose can only be made in his presence. Here such an order cannot be made in the absence of Miller's representatives. As to *Brown* v. *Burdett* (2), I agree that, where taxation only is directed, the Court has seisin of the matter; but that case shews that, where there is not only an order for taxation but also an order for payment, the Court has then lost the seisin. As in the present case there has been an order for payment as well as for taxation, and having regard also to the lapse of time and the merely technical default of the late trustees, I ask the Court not to interfere. Moreover, the effect of affirming the order of the Court below will be to do an injustice to third parties, Coward's present solicitors, for it will prevent their getting costs due to them as Miller's successors, costs which they have done nothing to forfeit.

LINDLEY L.J. This case has certainly brought to light matters which bring great discredit on Chancery proceedings in administration actions. Without going into many details, there can be no doubt whatever that the estate of this testator has been worked by Mr. Miller, who is now dead, for his own advantage. Steps have been taken for the sole purpose, so far as I can judge, of making costs: I am referring now more particularly to the mortgages, one of which was absolutely useless and worthless, and to the proceedings in the Queen's Bench action to set aside the lease of the public-house, which were equally discreditable; and the consequence is that this estate has disappeared to a very great extent. I do not say that no costs have been properly incurred; but the estate has

(1) [1895] 1 Ch. 141. (2) 37 Ch. D. 207; (1888) 40 Ch. D. 244.

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disappeared to a very great extent in the payment of costs which have been improperly incurred, and which, so far as I can see, have been incurred without any justification whatever. What, then, are we asked to do?

Certain orders for the payment of costs have been made, but before any payment has been made under those orders circumstances have come to light which have induced Kekewich J. to say that no further costs ought to be paid out of this estate until certain conditions have been complied with which I will mention presently. What he has done is this: he has made an order referring to those orders for payment. He has not set them aside, because in the first place he has no jurisdiction to set them aside: he has not attempted to do so; but he has said, "I shall stop the payment of the costs directed to be paid by those orders until certain steps have been taken."

It appears that by an order dated July 22, 1887, certain costs which had been taxed under a previous order were directed to be raised by the trustees of the will and paid into court. The object of that payment into court was that the money might be applied in payment of the costs which had been taxed. Now Kekewich J. has, by his order which is now appealed from, said: "I will not allow any more costs to be paid out of this estate until you, the late trustees, have brought into court that money which you have raised and which you have not yet brought into court." The form of this order, and the substance of it, is to stay the payment of costs which had been ordered to be paid by two orders of February 4 and December 23, 1892, to the late trustees of the will until they had done that which they ought to have done under the order of 1887.

Now, pausing there for a moment, let us consider whether the learned judge had any jurisdiction to make such an order. I cannot suppose for a moment that there was no power to make it. The state of things is this. It is brought to the attention of the judge that trustees have disobeyed the order of the Court—that is, the order of 1887. He says, "Very well: those trustees were directed to bring certain money into court. They have since obtained certain orders for payment out to them of moneys for costs. I will stop that until they have

performed their duty." I cannot conceive that there is the slightest difficulty in upholding the jurisdiction.

Mr. Bramwell Davis, in opening the appeal, said that the learned judge had done wrong, because, even if he had jurisdiction, it was a mere technical objection that the trustees had not paid this money into court as directed by the order; that they had raised the money and applied it in the way in which it ought to have been applied under the order of the Court; and that they had done that with the sanction of the chief clerk, although no order to that effect had been drawn up. I must say that that seemed to me to require some little consideration; and it appeared to me for the moment that it was quite possible that an injustice had been done to Mr. Coward and his co-trustee simply because they had not gone through the formality of paying the money so raised into court: and if it really were true that this money had been applied as it ought to have been, though it had not been brought into court, probably I should not have come to the conclusion at which I have ultimately arrived.

But, technically, the learned judge had jurisdiction to make the order that he did; and, technically, the order which he made was perfectly right. Therefore we must look further and see whether any injustice has been done to Mr. Coward by insisting on the performance of that condition. If I thought that injustice had been done to him, I should have found some method, I have no doubt, of getting rid of the technical objection; but when we come to look at the matter more closely it appears to me that no injustice will be done at all by upholding Kekewich J.'s order. Mr. Coward was evidently a trustee acting under the direction of Mr. Miller, the solicitor. I am not going to say anything against Mr. Coward: I know nothing at all about him, except that it is obvious that he left everything to Mr. Miller: I have no doubt at all about that, and that he did whatever Mr. Miller wanted him to do. We must look through Mr. Coward to Mr. Miller; and if we once see that Mr. Coward was a nominee of Miller, or was acting simply as a person who had placed the matter in Miller's hands, that will assist us a great deal. The real substance of

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the matter is that this is an application on behalf of Miller, or Miller's representatives, or Miller's successors in business, to obtain more costs out of this estate. That is the real state of the case. As I have said, I think that the order is technically right. It is said that we have no jurisdiction to make any order against Mr. Miller, and I do not think that we have. On this occasion I think that the utmost we could do, if we chose to do it, would be to follow the precedent set in the case of *Brown* v. *Burdett* (1), and to direct some inquiry before the taxing master to see how much of these costs which have not been paid can properly be saved to the estate. I do not think that *Brown* v. *Burdett* (1) is at all against making such an inquiry. I do not think the arm of the Court is so short that it cannot direct an inquiry at any stage, unless it comes to the conclusion that the inquiry will be useless and that the money has passed beyond its control, and so forth. There is nothing that I can see which goes to shew that we could not do so if we thought it right; but, as any inquiry of that sort would involve the estate in still more expense, we do not propose to do that.

It comes back, then, to this, that I do not look upon this order as open to objection on technical grounds at all. I think that it is an effort rightly made, and which ought to have been made, by the Court to prevent further robbing of this estate in the shape of costs. Technically, therefore, it is right. I for one try to get over technicalities unless there is substance and merit behind them. In my judgment, there is substance and merit behind this so-called technicality, and I think it would be wrong to give effect to what Mr. Bramwell Davis has urged upon us as an injustice to Mr. Coward. As to Mr. Coward's present solicitors, so far as I know, they have behaved perfectly properly; but they have the misfortune of having a client who has not obeyed the orders of the Court. I think that it would be scandalous to discharge this order, and the appeal must, therefore, be dismissed with costs.

A. L. SMITH L.J. I am of the same opinion. In the few observations that I am about to make I wish to say that I

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thoroughly exculpate the present solicitors on the record, Messrs. Gedge, Kirby & Millett. The person at the bottom and foundation of all this scandalous waste of money has undoubtedly been no other than Mr. Miller. Although he is dead, I must say that of him; but I will say no more.

Now, what are the plain and unvarnished facts of this case? A man with a small estate of about 10,000*l.* dies, and his estate is administered in the Court of Chancery. Out of that estate something like 3500*l.* is spent in costs—and for whose benefit? No person has benefited from first to last except Mr. Miller. That is the case. It is enveloped in orders; it is enveloped in certificates; it is enveloped in mortgages; it is enveloped in deeds; it is enveloped in all manner of other matters. Now, can it be right, in the administration of a small estate like this, that 3500*l.* should be expended? There were two actions about a small public-house in Wakefield. One action was taken up into the Divisional Court. Before the first action was brought to trial a compromise was offered. All that I will say of Mr. Miller with regard to that compromise is that no man in his senses, unless he had been a solicitor wishing to make costs out of the estate, would have thought of doing otherwise than accept that compromise. That offer of compromise was never brought to the notice of the Court at all, and the result was that 3500*l.* worth of costs were incurred in administering this small estate and in fighting these two actions about this small public-house in Wakefield.

Now, what happened next? There is a trustee, Mr. John Coward, who is obviously really the nominee of the solicitor, Mr. Miller. On July 22, 1887, Kay L.J., then Kay J., made an order relating to costs, the trustee, Mr. John Coward, and his co-trustee, Mrs. Scowby, being ordered to raise money and to bring that money into court for the purpose of providing for costs. That money was raised in the way that has been pointed out by my brother Lindley; but the trustees, acting through Mr. Miller, their solicitor, never obeyed that order, and have never brought that money into court up to the present moment. It is said that the money has been applied in the same way as it would have been applied if it had been

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brought into court; but, at any rate, the late trustees are in default, because they have never obeyed that order of July 22, 1887, up to the present moment.

The only other two documents which I need call attention to are two orders made by my brother Kekewich—one on February 4, 1892, and the other on December 23, 1892—by which the learned judge ordered the taxation and payment of certain costs to Mrs. Scowby and Mr. Coward, the old trustees. Those costs never have been taxed up to the present moment, nor has payment yet been made to the old trustees of those costs which, in the ordinary course, they would have been entitled to under those orders.

On June 15, 1896, the new trustees took out a summons before Kekewich J. to stay payment of the costs of the old trustees under those two orders of February 4 and December 23, 1892, until they had performed the obligation which was imposed upon them by the order of July 22, 1887—namely, to bring the moneys which were then to be raised into court. My brother Kekewich, on December 17, 1896, made the order, the effect of which was, that the new trustees were not to pay the old trustees, who were in default, any more costs out of this estate, which had already been mulcted to the extent to which I have already alluded.

Now, first of all, had the learned judge jurisdiction to make this order of December 17, 1896? He did not touch the previous orders of February 4 and December 23, 1892, nor had he any jurisdiction to do so. What he did was to make a supplemental order, to the effect that the two orders of February 4 and December 23, 1892, are not to be further acted upon until the trustees who are in default have put themselves out of default by bringing the money into court as they were ordered to do in 1887, and which they have never done up to the present moment. That he had jurisdiction appears to me to be clear from the judgment of the Lord Chancellor in *Preston Banking Co.* v. *William Allsup & Sons* (1), to which I was a party, and which is to the effect that there is jurisdiction to make a supplemental order upon new facts, although there is

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no jurisdiction to alter an order when once it has been drawn up and entered. That being so, I think that my brother Kekewich no doubt had jurisdiction to make the order now appealed against.

Then it is said that it is only by reason of a technicality that the learned judge was able to do what he has done; because, if the defaulting trustees had paid this money into court, there would have been no occasion for doing that which has been done. I quite agree with my brother Lindley that technicalities are to be avoided as much as possible, and I have always set my face against technicalities; but when there is a technicality which brings about justice—a technicality which, as here, brings about that which is eminently just as between an estate which has been mulcted in the way this estate has been, and trustees in the position of Mr. Coward and Mrs. Scowby—all I can say is, I avail myself of that technicality and act upon it.

I think that Kekewich J. has done what is essentially right and just in this case, and that he had jurisdiction to do what he has done; and therefore the appeal should be dismissed with costs.

RIGBY L.J. I am of the same opinion. In this case Kekewich J. has made an order under circumstances which I am glad to say very seldom arise. The result of that order is, as was pointed out to us, in all probability to save this small estate, which has already suffered to an unusual extent in payment of costs, a sum of about 200*l.* That is so attractive to, so consonant with, one's sense of what is just and equitable, that, for myself, I was very much on my guard against being allowed to be too much attracted by the result of the order. I was throughout on my guard to take care that no injustice was being done with a view to producing that beneficial result; but I am perfectly satisfied that the order is not only beneficial in its result, but that it is well founded in justice, and that it cannot by any possibility injure anyone who has the slightest legal ground for complaint. There are two orders of February and December, 1892, under which John Coward, a former trustee of the estate which is being administered, is entitled

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to costs—orders made by Kekewich J.; orders which were never appealed against; orders which he had no jurisdiction to interfere with in any way, which he has not in any way attempted to interfere with, and which we have no right to interfere with. Those orders stand. Under them Mr. Coward claims to be entitled to costs amounting to about 200*l.*; but it was subsequently brought to the notice of the Court that that trustee, Coward, and his co-trustee, Mrs. Scowby, were in default; that they had been ordered to pay large sums of money into court; and that they had never done so. It has been suggested that, notwithstanding that state of things, because the orders were final for payment of costs, the trustee is of right entitled to carry away the costs which are adjudicated to him by those orders although he is in default. I cannot conceive that there is any ground for that contention. The moment you find that a trustee entitled to costs is a defaulter, and if he got the costs might remain a defaulter, the jurisdiction of the Court to stay the order appears to me to be plain; and indeed, so far as jurisdiction is concerned, I have no doubt that the learned judge had ample jurisdiction for the order that he made.

But then—and this required much more careful consideration—it was said that, although the trustee was technically a defaulter, there had been no sort of damage done, and that it would be a great hardship upon him to treat him as a real defaulter and to take advantage of a technicality only to deprive him of costs to which he was justly entitled. That was a point requiring, in my judgment, very careful consideration. Now let us look at the state of things which led to that "technical default," as it is called. There had been an order of July 22, 1887, made on the adjourned further consideration of the administration action, which provided in the regular way for raising a large sum of money which it was anticipated would be required for the payment of costs, a sum of money many times exceeding the amount of the costs which Coward would be entitled to under Kekewich J.'s orders of 1892, and for payment of the moneys, when so raised, into court. Now, although undoubtedly appearances were all in favour of an

order of the Court being made, when the money had come into court, for payment to certain solicitors, and notably to a Mr. Miller, who had had, almost entirely, the sole conduct of these proceedings, yet no such order was made. At this time a similar state of things arose in an administration action of *Brown* v. *Burdett* (1), which was attached to the Court of Kay J., and in November of the same year—1887—he had in that action taken a very strong but a very just step: he had taken into his own hands the consideration whether the costs should or should not be paid, although all parties asked the Court that those costs might be paid, and every one was agreed that they ought to be paid. He looked into the matter himself, and he directed an inquiry to be made. That was in November, 1887; and on December 14, 1887, that decision of his was affirmed by the Court of Appeal, and I do not doubt that that decision, so affirmed by the Court of Appeal, aroused the fears of a great many people as to what might happen to them upon the question of costs. I cannot, of course, treat it as absolutely proved, but I do not doubt that, among others, Mr. Miller was aroused to a sense of the position in which he might be when, having paid the money into Court, as it was his duty to do as solicitor for John Coward, Kay J.'s attention would be called to the fact that sums amounting to 3500*l.* and upwards were being charged as against this small estate—a sum which I think it would have been very difficult indeed to induce that learned judge to consider as a proper expenditure on account of the estate; and on December 29, a fortnight after that decision of the Court of Appeal, we find the first step taken by Mr. Miller—taken, I have no doubt, to avoid the unpleasant necessity of coming before Kay J. himself and having this question raised.

On December 29 he takes out a summons to have the order made on the adjourned further consideration made in the terms of the minutes annexed to the summons. I do not hesitate to say that those annexed minutes were and must have been known to Mr. Miller to be absolutely wrong, not only as being against the practice of the Court, but as withdrawing (and I

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have no doubt such was his intention) from the notice of the judge that he was claiming as against the estate these immense sums of costs. He never got an order for that; I doubt, indeed, whether he dared to provoke a direct order, either from the chief clerk or any one else; but he got what he thought would serve his turn: he got on the notes of the chief clerk a kind of approval of those minutes; but he never endeavoured to have them embodied in an order. I can imagine the position in which he would have been placed, with regard to his costs, if he had asked for an order, and the chief clerk had said, "This ought to be adjourned to the learned judge." At any rate, he did violate the order of the Court, and without even getting, as far as he was concerned, the justification of an order in chambers, he ventured to intercept the moneys which he knew ought to have been paid into court and to appropriate them, or the greater part of them, to his own use. No doubt it may be said that he might have got them under a further order of the Court; but I think it more likely that he might not, and I think he knew that perfectly well. If, therefore, the case were one that concerned him alone, I do not think there could be a moment's hesitation; but I felt great doubt as to whether we might not be doing injustice to Coward. Coward, that is, the trustee for whom Miller acted, apparently is a man of no resources; but I do not think we have judicial evidence upon which we can properly assume that he is a man absolutely without means. On what ground, therefore, can we make him liable? I hesitated for some time, for I saw at once that such a plausible case could be made for him on the story that the chief clerk had sanctioned in chambers this mode of dealing with the matter, as to make it appear possible that, as regards him, it was a technical blunder, and that we could hardly fairly and equitably treat him as having committed a breach of trust. Upon that point my difficulties were very much removed when Mr. Warmington called our attention to those extraordinary mortgages, and particularly to that mortgage the like of which I suppose was never before produced in a Court—at any rate, within my experience. I do not say that Coward was a dishonest trustee or anything of the kind. He probably was an

ignorant man; but he could scarcely be so ignorant as not to know that it was a wrong thing altogether, as a matter of business, to execute a mortgage with the mortgage money left in blank. He must have known it was a wrong thing to enable his solicitor to raise any sum of money which that solicitor thought fit to insert in the mortgage, for that was the result of it. I mention that, not as the only instance, but as one conclusive instance, shewing, first, that Mr. Miller was not acting honestly, and could not have believed that he was; and secondly, that Coward was reposing too much faith in Mr. Miller—was, in fact, surrendering his judgment entirely to him, acting as his dupe and his tool, and therefore not deserving of any kind of consideration with regard to the sums of costs that are due to him now. I do not go very much into the details of the costs themselves amounting to 3500*l.* because I am sensible that, after the lapse of time and by the death of Mr. Miller, we might miss important matters. It is not absolutely proved to my mind that the whole of that litigation was wrong, but we see quite enough in the case before us, and especially in that matter of getting the sanction of the chief clerk to a departure from the order of July 22, 1887, to know that Mr. Miller was acting in a way that no solicitor should act, and that he was doing so because his client Coward gave him such facilities for action as no client ought to give to any solicitor. By reason of that irregularity, that so-called technical disobedience to the Court, although it was obviously a great deal more than a technicality, Mr. Miller withdrew this large sum of costs from the cognizance of the Court and flattered himself, no doubt, that by that means he had obtained the payment of costs which it was very doubtful, to say the least of it, he could have got if Kay J. had been asked to make an order for payment of those very large sums.

Now, no doubt there is another point to be considered. Coward has no reason to complain even if it should turn out, which probably it will not, that he is injured, to the extent of these costs which he claims, by an action being brought against him by Mr. Miller's representatives; but Coward's present solicitors, who took up the matter apparently as successors to

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Mr. Miller, have conducted the business since Mr. Miller's death in July, 1892, and have done so in such a manner that not a word can be said against them. They are absolutely free from blame. It may be said, therefore, to be very hard that they should not get the amount due to them for costs of the trustee, Coward; and it is very hard: I will assume that, and one may sympathise with them. But have they any legal grounds for consideration which should induce this Court to stay its hand and pay to them money belonging ultimately to the beneficiaries of this testator's estate—money which ought not to be paid, as I think, until the trustee at any rate has made good his default, whenever that may take place? I think not. Assuming everything in their favour, as I do without hesitation, and that they had no reason to suppose that there had been anything wrong at all, yet they only come in as claiming through Coward; and if Coward was in such a position that neither he nor any solicitor of his was entitled to payment down of any costs that might be incurred, that is their misfortune; and, as between them and the cestuis que trust of this estate, I do not think that we have a right to choose, even if we had any wish to do so.

I think, therefore, that the order made by Kekewich J. is strictly and technically right. But I go a good deal further than that. I say it is substantially right, and that it ought not to be interfered with in any way. The appeal must, therefore, be dismissed with costs.

Solicitors: *Gedge, Kirby & Millett; Torr & Co., for Stewart, Son & Chalker, Wakefield.*

G. I. F. C.

GRAHAM *v.* SUTTON, CARDEN & CO.

C. A. 1897 March 12.

[1895 G. 626.]

Practice—Discovery—Production of Books—Common Order—Liberty to Seal up irrelevant Entries—Form of Order giving Liberty to Cover up without Sealing.

A party to an action, who has obtained against his opponent the common order for production and inspection of books and documents, giving liberty to the opponent to seal up such parts of the books as do not relate to the matters in question, is not entitled to insist upon the actual sealing up of such parts of the books where so doing would interfere with the conduct of the opponent's business or be oppressive; and the covering up upon oath of the irrelevant parts of such books is a sufficient compliance with the order.

Appeal from North J.

This action was brought in April, 1895; and in it the plaintiff, who was an agent employed by the defendants, a firm of wine and spirit merchants, to obtain orders for them on commission, claimed an account of the commissions due to him as their agent, payment of the amount found due, and inspection of the defendants' books. An order directing the account claimed from June, 1886, when the agency commenced, and reserving further consideration, was made on July 1, 1895; and an account in accordance with the order was delivered on October 2, 1895.

The plaintiff subsequently obtained an order for discovery, and Charles Thomas Sutton, one of the secretaries of the defendants, made an affidavit of documents in September, 1896.

On November 30, 1896, upon the application of the plaintiff, an order was made for the production by the defendants at their offices of twelve ledgers, thirty-two journals, five commission account-books, forty-six order-books, and twelve banker's pass-books, which were mentioned in the affidavit of documents; and by this order liberty was given to the applicant, his solicitors and accountants, to inspect and peruse the said books, and to take abstracts thereof and extracts therefrom; but previously to such inspection the defendants were to be at liberty to seal up such parts of such books as, according to an

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affidavit to be made by C. T. Sutton, did not relate to the matters in question in the account, and the defendants were to produce the same upon any examination of witnesses in the action as the plaintiff should require.

The defendants found, as they alleged, that it was impossible for them to seal up the irrelevant entries in these books without bringing their business to a standstill; and on February 17, 1897, they took out a summons asking that they might be at liberty, on the inspection mentioned in the order of November 30, 1896, to cover up such parts of the books therein specified (other than the ledgers) as did not contain entries relating to the accounts in question, that the ledgers being already sealed up might be used by them in their business during the inspection, and that the sealed parts might be unsealed.

In support of this application they produced evidence to shew that they had continually to refer to the books specified in the order for the purposes of their business, and that as there were numbers of entries on each page, some of which were and others were not relevant, the sealing up would not only take a very long time, but would involve the stoppage of the whole of their business in the department with which the plaintiff was connected.

The plaintiff, however, insisted on his right to have the books sealed up according to the terms of the order, and objected to their being closed or covered up in any other way.

The application of the defendants was heard before North J. in chambers on March 1, 1897; but his Lordship did not think fit to make any order except that the applicants were to be at liberty to unseal and reseal on oath from time to time, as the books might be required for the purpose of their business, such parts of them as did not relate to the matters in question in the account ordered to be taken, and directed that the costs of the application were to be the plaintiff's in any event.

The defendants, having obtained leave from the Court, gave notice of appeal, in which they asked that they might be at liberty on the inspection to cover up from time to time on oath such parts of the books in question as did not contain any entries relating to any matters in question in the action, and to

produce on such inspection upon oath from time to time such entries only as related to the matters in question, without on each occasion sealing up the irrelevant entries, or that such further or other order might be made to enable inspection to take place without a stoppage of the defendants' business for the production of entries wholly irrelevant to the questions in the action, and in such manner as not to be oppressive to the defendants, as to the Court should seem fit.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the appellants. The appellants are perfectly ready to carry out the spirit of the order of November 30, and to give every reasonable facility for the inspection of their books. But an enormous proportion of the entries in these books have nothing to do with the matters in question, and the liberty to seal up (which was for the protection of the defendants) ought not to be construed so as to exclude all other methods of covering up entries, and to compel a party to seal up when so doing would be vexatious and oppressive, and would actually bring his business to a standstill. The appellants are willing that their secretary should go through the books with the plaintiff's accountant, and point out all the material pages, covering up only the irrelevant entries, and should verify this on oath. They do not ask for the costs of the summons of February 17, but they ask for further relief and the costs of this appeal.

Swinfen Eady, Q.C., and *T. L. Wilkinson*, for the respondent. Unless the order is complied with and the entries are sealed up, the respondent does not obtain the oath of any one that the pages shewn contain the only material entries, or that the entries shewn are the only material ones, and it is important for him to have this sworn to. He is entitled to have this, and has never got it.

No reply was called for.

LINDLEY L.J. This is one of those cases which shew that the Court must take care to see that its order should not be in form intolerable to a litigant. On November 30, 1896, an order for production of documents was made in the common form, which in the great majority of cases may be a useful form, but

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in some cases may be very oppressive. In this case to enforce a literal compliance with the order would be a scandal. The inspection must be carried out in a way which will work without being oppressive. The order goes too far. North J. has relaxed it to a certain extent; but, even now, it seems unworkable and more vexatious than is necessary for the purposes of justice.

What we are asked to do by the notice of appeal is in substance right. It is not necessary that the parts of the books which are not to be shewn should be sealed up. There is no magic in sealing up: it is only one method of preventing people seeing the entries, and covering up is as good as sealing.

It appears to me that we ought to discharge the order made by North J., and make an order in the form asked by the notice of appeal. Under that an affidavit will not be required every day that the books are used; but upon an inspection Mr. Sutton must say on oath that no parts of the books that are relevant have been covered up during it. We only require him to make an affidavit as to what he has done. There is nothing oppressive or unjust in that.

As regards the costs, the defendants had to obtain some kind of variation of the order originally made, and they must pay the costs of the summons to do that; but they must have their costs of this appeal. I am sorry to see any order of the Court used so oppressively as this has been. The case affords a very lamentable example of the oppression which can be inflicted under an order in the common form.

A. L. SMITH L.J. I am of the same opinion. The plaintiff has obtained against the defendants an order for an account covering a period of ten years from 1886 until the time the action was brought. On November 30, 1896, he obtained an order that he or his solicitor and accountant should have discovery and inspection of some hundred or more books. That is a very large order, but it is said that it is in the common form. But a common order should not be applied to uncommon circumstances. Assuming that the ledgers are honestly made, they are all that the plaintiff would want to see for the purpose

of testing the account; but he has got an order to inspect thirty-two journals, five commission-books, forty-six order-books, and twelve pass-books. I say that this is the kind of order which makes the administration of justice stink in the nostrils of commercial men. To have their books ransacked in this way is just what keeps them from bringing their cases into court. The proper thing to tell the plaintiff would be, that as the ledgers, if honest, will give him all that he wants to know, he must if he wants to see any further books impugn their honesty, and if he cannot do that, he cannot have an order for a general inspection. It is obvious that he only wants to see all these books for the purpose of seeing whether the ledgers are right or not; that is, for the purpose of surcharging the ledgers. He lays no ground for this.

The order was made—it is said in the ordinary form—that such parts of the books as do not contain entries material to the matters in question are to be sealed up. The defendants suggest that they should not seal them up, but that their secretary, Mr. Sutton, should go through the books with the plaintiff or his solicitor and accountant, and shew them page by page all parts of the pages which it is material for them to see, and put a sheet of paper down on such parts as are not material, and afterwards state on oath that he has shewn them everything that was material for them to see. The plaintiff says that that is not sufficient. Neither will he be satisfied if the pages of the books that are not material are tied up with tape. They must be sealed up for him and nothing less. The order of November 30, 1896, has been worked in a most oppressive way. The defendants have appealed to us, and have shewn us what is the truth of the case, and they are entitled to succeed. They do not ask for the costs of their summons, but they must have the costs of the appeal.

RIGBY L.J. I am of the same opinion. The defendants have been so far wrong that they should not have brought forward the case in the way that they have done. They asked at first for an insufficient order, that is, one giving them leave to unseal the pages of the books sealed up for the purposes of

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their business, and to reseal them. They ought to have known that that would not do; but they appear to have been acting according to precedent. However, although they have acted wrongly, they are entitled to be relieved—only they must pay the costs of it, and that is not contested.

As regards the plaintiff, he has been wrong from first to last. He was wrong in asking for such an extravagant order, and wrong in insisting upon having his pound of flesh. I cannot believe that if any suggestion had been made that he would not get the benefit of an oath on each occasion, that there would have been the slightest difficulty as to his having that. Moreover, I do not think that these strict rights ought to be insisted upon. I have never known any difficulty of this kind arise in practice when documents had to be produced, even where examinations of witnesses have gone on week after week. I doubt whether in these cases there was any order of the Court which prevented ridiculous objections being taken; but solicitors do not do their duty to their clients by insisting upon the strict letter of their rights. That is the sort of thing which, if permitted, brings the administration of justice into odium. It is our duty to prevent such consequences if we can. When the defendants found themselves in a difficulty they applied to the Court for assistance, and they must pay the costs of obtaining it. They must however have the costs of this appeal.

The order made by the Court of Appeal, as passed and entered was, so far as material, as follows:—

This Court doth order that, notwithstanding the said order dated the 30th November, 1896, as to sealing up, the defendants be at liberty on the inspection under the said order to cover up from time to time such parts of the books therein mentioned as do not contain any entries relating to any matter in question in the account directed by the order dated 1st July, 1895, and to produce on such inspection from time to time such entries only as relate to the matters in question in such account without on each occasion sealing up the entries which do not so relate. But at the conclusion of such inspection an affidavit is to be made by Charles Thomas Sutton the younger on behalf of the defendants that no parts of the books which have during such inspection been so covered up contain entries which do so relate.

Solicitors: *C. E. Tranter Lamb; Howard & Atherton.*

W. W. K.

WHITE *v.* SOUTHEND HOTEL COMPANY.

C. A. 1897 March 23.

[1896 W. 2489.]

Lease—Hotel—Lessee's Covenant—Covenant not to buy Wines except from Lessor, his Successors or Assigns—Proviso for Abatement of Rent—Covenant running with the Land—Assignment of Wine Business—Assignment of Lease.

A lease by a wine merchant of an hotel for thirty years at a rent of 1500*l.* a year contained a covenant by the lessee with the lessor, his heirs and assigns, that he, the lessee, would not during the term buy or sell on the premises any foreign wines other than should have been supplied by the lessor, his successors or assigns; and it was provided that so long as the lessee should observe this covenant the lessor should allow the lessee an abatement of 75*l.* from each quarter's rent.

The lessor died during the term. The plaintiffs, who were his executors, sold his wine business to the firm of W. & P.; and the lessee assigned the lease of the hotel to the defendants. The defendants claimed that, so long as they continued to buy wines from W. & P., they were entitled to the abatement from each quarter's rent; but the plaintiffs insisted that, when the ownership of the wine business and the ownership of the reversion upon the lease were severed, the covenant to buy wines ceased to be operative, and consequently that the defendants were not entitled to the benefit of the proviso:—

Held, (1.) that, although the covenant to buy wines did not in terms include the assigns of the lessee, the burden of it ran with the tenant's interest under the lease, and (2.) that the assigns of the lessee were still bound by the covenant and entitled to the benefit of the proviso for abatement of rent.

The decision of Kekewich J. affirmed.

Appeal from Kekewich J.

By an indenture of lease, dated June 13, 1882, Sir Thomas White, who carried on the business of a wine and spirit merchant at 61, Mark Lane, under the firm of White & Price, demised to W. R. Fuller certain freehold premises at Southend, known as the Royal Hotel, Southend, for the term of thirty years from June 24, 1882, at the yearly rent of 1500*l.*, payable quarterly. The lease contained the usual covenant for payment of the rent, and covenants by the lessee that he would not at any time during the term convert the premises into a

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private house, or use or suffer the same to be used for any other trade, profession, business, or purpose than an hotel and licensed victualling house; and would conduct the same in a proper manner, and afford no reasonable ground for refusing or withdrawing the licences. Then came a covenant in the following terms: "And the lessee doth hereby also covenant with the lessor, his heirs, and assigns that he, the lessee, shall not nor will during the term hereby granted buy, receive, sell, or dispose of, either directly or indirectly, nor suffer or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said premises, or any part thereof, any foreign wines or any spirits, except gin, or other excisable liquors whatsoever, other than shall have been bonâ fide supplied by or through the lessor or his successors or successor, assigns or assign, provided the said person or persons shall be willing to supply the same of good and proper quality to the lessee at the fair current market price thereof."

The lease also contained (inter alia) the following proviso:— "Provided also and it is hereby agreed and declared, that so long as the lessee shall well and truly observe the covenant on his part lastly hereinbefore contained not to buy, receive, sell, or dispose of, either directly or indirectly, nor suffer or permit to be bought, received, sold, or disposed of either directly or indirectly, in, upon, out of, or about the said premises or any part thereof, any foreign wines, or any spirits (except gin), or other excisable liquors whatsoever, other than shall have been bonâ fide supplied by or through the lessor or his successors or successor, assigns or assign, in manner aforesaid, then the lessor will allow to the lessee an abatement of 75*l.* from each quarterly payment of the rent hereinbefore reserved; but immediately upon any breach of the said covenant such abatement shall cease."

Sir Thomas White died on March 8, 1883, having by his will (which was duly proved) devised all his real and personal estate not otherwise disposed of (which devise included the said freehold premises at Southend) unto the plaintiffs upon certain trusts, and having appointed them his executors.

On July 9, 1883, the plaintiffs sold the business of a wine and spirit merchant formerly carried on by Sir Thomas White at Mark Lane to Messrs. T. & J. J. Curtis, who now carried on the same business under the firm of White & Price.

On September, 25, 1883, Mr. W. R. Fuller, who had duly observed the covenant as to the purchase and sale of wines and spirits, assigned the lease of the hotel at Southend to the defendants.

The defendants claimed that, so long as they continued to purchase their wines and spirits from Messrs. White & Price, they were entitled as of right under the proviso in the lease to a rebate of 75*l.* from each quarter's rent. The plaintiffs however contended that, upon the ownership of the wine and spirit business and the ownership of the reversion to the demised premises being severed, the covenant in the lease to purchase wines and spirits from Sir Thomas White, his successors or assigns, ceased to be operative, and consequently that the defendants were not entitled to the benefit of the proviso.

This was an originating summons taken out by the plaintiffs in order to have the true construction of the lease determined by the Court.

The summons was adjourned into court, and came on before Kekewich J. on January 14, 1897, when his Lordship made a declaration that according to the true construction of the lease the defendants were entitled to the abatement of the rent.

The plaintiffs appealed.

Farwell, Q.C., and *Lyttelton Chubb*, for the appellants. There is now no enforceable covenant as to the purchase and sale of wines and spirits, and as the covenant has ceased to be binding, and the burden of it is gone, the defendants are not entitled to the benefit of the proviso, which is to take effect only "so long as the lessee shall well and truly observe the covenant."

Before severance the covenant might have run with the land. Now the business and the reversion are not going on together. It is no longer an advantage to the landlord to enforce the

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covenant: *Vyvyan* v. *Arthur* (1); *Spencer's Case* (2); *Doe* v. *Reid.* (3)

Eve, Q.C., and *Martelli*, for the respondents. The negative covenant not to buy or sell, or suffer to be bought or sold, in or about the premises any foreign wines or spirits other than supplied by or through the lessor, his successors or assigns, is a covenant which runs with the land demised during the term, and is binding upon the assignee of the lessee, although he is not expressly referred to in the covenant; and, having the burden of the covenant, he is entitled to the benefit of the proviso, which was no doubt known to him and taken into consideration when the amount of his purchase-money was fixed: *Tulk* v. *Moxhay* (4); *Clegg* v. *Hands* (5); note to *Hinde* v. *Gray* and cases there mentioned (6); *Tatem* v. *Chaplin* (7); *Fleetwood* v. *Hull* (8); Redman and Lyons' Landlord and Tenant, 4th ed. p. 442. Independently of authority, it is a constant practice to buy hotels and public-houses for the purpose of treating them as "tied houses," and this was no doubt intended here. Primâ facie, a covenant of this kind would run with the land during the whole of the term; and here the words of the covenant support this construction; for the covenant is to operate in favour not only of the lessor, but of his "successors or successor," thus providing for a change of partnership, and his "assigns or assign" providing for a sale of the goodwill of the business. So that we are brought within the words of the clause.

Farwell, Q.C., in reply. This was a covenant for the benefit of a particular business, and its true effect was as an affirmative covenant to buy from a particular firm, which covenant has by severance now become merely collateral. [He referred to *Thomas* v. *Hayward* (9) and *Stevens* v. *Copp.* (10)]

LINDLEY L.J., after stating the facts of the case, and the terms of the covenant in the lease as to the purchase and sale

(1) (1823) 1 B. & C. 410, 414.
(2) (1583) 5 Rep. 16 a.
(3) (1830) 10 B. & C. 849, 856.
(4) (1848) 2 Ph. 774.
(5) (1890) 44 Ch. D. 503.
(6) (1840) 1 Man. & G. 208, n.
(7) (1793) 2 H. Bl. 133.
(8) (1889) 23 Q. B. D. 35.
(9) (1869) L. R. 4 Ex. 311.
(10) (1868) L. R. 4 Ex. 20.

of wines and spirits, continued:—The object of that covenant is plain enough. It is indirectly to compel the lessee to get all his foreign wines and spirits from the lessor and his successors in business, assigns or assign, whatever that may mean. Now the lessee has entered into this restrictive covenant for himself, but not in terms for his assigns, and the first question which we have to consider is whether, notwithstanding the omission of the word "assigns," the burden of this covenant runs with the tenant's interest so as to bind the assignee, although not named.

Questions of this kind are always somewhat troublesome and difficult; but, having regard to the authorities to which our attention has been called, and especially to such cases as *Tatem* v. *Chaplin* (1), *Clegg* v. *Hands* (2), and *Fleetwood* v. *Hull* (3) (the last before my brother Charles in 1889), it appears to me that it is impossible to say that the tenants' "assign" is not bound by this covenant. It is a covenant restraining, in fact, the lessee and his assign (although not named) from using this property in a particular way. In the old language which we are accustomed to with reference to matters of this kind, that is a covenant "touching the land." I think that is plain, not only from what was said by this Court in *Clegg* v. *Hands* (2), where we had a somewhat different problem to solve, but also from the decision of Charles J. in *Fleetwood* v. *Hull* (3), which contains a very full and careful investigation of what is meant by the expression "touching the land." It appears to me, on those authorities, that this covenant touched the land, and that consequently the defendants are bound by it.

Pausing here for a moment, the defendants are being sued, not by the purchasers of the wine business, who could not of course maintain any action at all on this lease, but by the executors of the lessor. The lessor happens to be dead, but his executors are as regards this matter in no worse position than himself, and I do not see an answer, at law or in equity, to an action brought by the lessor's executors against the present defendants upon a breach of this covenant; and supposing there was such

(1) 2 H. Bl. 133. (2) 44 Ch. D. 503.
(3) 23 Q. B. D. 35.

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an action, I do not think it follows that the damages would be merely nominal. It is to be observed that the covenant is as to "wines or spirits supplied by or through" the lessor, his successors or assigns, and it does not follow that the damages would be necessarily nominal. However, if they were, it does not appear to me to be material. What is material is to see whether an action would lie by the lessor and his legal personal representatives against the assign of the lessee for breach of the covenant. I think it would.

If that is so, it throws a great deal of light upon the clause which has given rise to this controversy. There was a covenant in the lease, as I have stated, to pay a rent of 1500*l.*, and the lease contained a proviso that so long as the lessee observed the restrictive covenant as to the purchase and sale of wines and spirits the lessor would allow an abatement of rent: [The Lord Justice then read the terms of the proviso, and continued:—] This is not a provision for setting off against the rent what the tenant will buy from the landlord; it is a proviso for abating the rent; and, in my opinion, it is a provision which enures for the benefit of the assign of the lessee just as the burden of the covenant has to be borne by him.

Mr. Farwell, in opening the appeal, made a point which at first sight rather impressed me. He said that these are personal covenants. I do not think they are, if you examine them carefully. Then he said there was no covenant which the assign could "well and truly observe," because there was no obligation thrown upon him at all; and if that were so, if the case was that the tenant, without being bound by any covenant, merely for his own convenience, happened to buy spirits or beer of the present owners of the wine and spirit business, I should have great doubt whether this proviso for reduction did apply to it. But the whole difficulty to which that argument gave rise disappears when you come to the conclusion (as I have done) that the tenant of this hotel is bound by the covenant. Then the proviso applies, and applies in actual terms, without any difficulty at all. We are asked to say whether, inasmuch as the present tenants have bought wine and spirits of the successors in business of the lessor, they are entitled to this abatement of

their rent. The learned judge has come to the conclusion that they have, although he did not rest his decision upon the ground that they were bound by the covenant, and he seems to have thought that they would be entitled to the abatement whether they were bound by the covenant or not. I am not prepared to go so far as that; but, coming to the conclusion that they are bound by the covenant, and that this proviso for abatement of the rent exactly hits that case, it appears to me that the learned judge is right.

Mr. Farwell, on behalf of the appellants, has drawn our attention to various cases, and he has suggested that inasmuch as the title to the reversion is in one person and the title to the wine and spirit business is in another, these covenants cannot now be enforced by the owner of the reversion. My answer is, look at the terms of them.

It appears to me that the learned judge is right, though, as I have said, I prefer to base my decision on somewhat different grounds to those upon which the learned judge founded his decision.

A. L. SMITH L.J. (after stating the facts of the case and the contentions on either side) said:—The first question to be determined by the Court is whether the restrictive covenant as to the purchase and sale of wines and spirits runs with the land. Many authorities have been cited; but I will only mention three of the most pertinent, which shew that a covenant of this kind, i.e., one to use premises in a particular way, attaches to the subject of the demise so as to be what is called a covenant running with the land, even though the word "assign" is not used in the covenant of the lessee. The cases to which I allude are *Tatem* v. *Chaplin* (1), *Clegg* v. *Hands* (2), and *Fleetwood* v. *Hull* (3), in which latter case most of the authorities on this point are summed up by my brother Charles; and I have come to the conclusion that this is a covenant running with the land, the burden of which must be borne by the assignee of the lessee. When once that conclusion is

(1) 2 H. Bl. 133. (2) 44 Ch. D. 503.
(3) 23 Q. B. D. 35.

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arrived at, the contention on the part of the executors of the lessor becomes hopeless; because if the covenant is binding on the assignee of the lessee, it is obvious that the proviso attached to the covenant is binding on the legal personal representatives of the lessor, and that they must allow the abatement of 75*l.* from each quarterly payment of the rent, which will amount to 300*l.* a year. Kekewich J. has arrived at the right conclusion, and this appeal must be dismissed.

RIGBY L.J. In this case the counsel for the appellants have not, in my judgment, succeeded in displacing the authorities which have been cited against them in order to shew that a covenant of this kind, under ordinary circumstances, runs with the land so as to confer the benefit of it upon an assignee.

It is the nature of a covenant, far more than the question whether or not the assign is mentioned in it, which determines whether it shall run with the land or not. There are some intermediate cases in which one does not really know from the nature of the case whether the covenant is intended to extend beyond the first lessee or not; but where, as here, you find a covenant of such a nature that it affects directly the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him, it seems to me that in accordance with general principle the covenant ought to run with the land, whether the word "assign" is mentioned or not. I agree that the assigns or successors of Sir Thomas White's wine business can have no right to sue on this covenant; and even if it had been assigned to them in express terms, they would have taken nothing by it. You cannot impose upon a lessee an obligation towards a person as to whom he has undertaken no obligation at all. But that is not the point. The question is this: Is it an existing covenant which the executors of the lessor could now enforce against the present tenants of the premises under this lease? I think they could, and if for no other reason, because the covenant is that the lessee is not to sell any foreign wines or spirits unless they are provided "by or through" the lessor, his successors or assigns. I see no reason why, if the present tenants absolutely refused to comply with the covenant,

there should not be an action for breach of it; and I do not say that such action would necessarily involve nominal damages only, though perhaps that is not important. The proviso, again, is to operate "so long as the lessee shall well and truly observe the covenant on his part hereinbefore contained." For the purposes of this argument, at any rate, it is admitted that they have down to the present time duly observed that covenent if existing. They have taken their wines and spirits from the successors to the business of Sir Thomas White, and there is no allegation of any breach of the covenant. When we get over that difficulty it seems to me that the present lessees, as they were liable to the burden of the covenant, are entitled to the advantage intended to be secured by the proviso. It is a covenant relating to the rent of the property, and, therefore, in a very important manner relating to the property itself.

I think that the declaration made by the learned judge in the Court below was correct; and I am all the more satisfied upon the point because I think that between the parties to the lease 1500*l.* was never intended to be the real rental. It is, at any rate, very likely that the rent was 1200*l.* from the first, and that 1500*l.*, with an abatement of 300*l.*, was put in in order to make a compliance with their terms more easily secured.

LINDLEY L.J. The appeal is dismissed with costs.

Solicitors: *Hewitt & Chapman; Mossop & Rolfe.*

W. W. K.

C. A.
1897
NORTH J.
Feb. 11.
C. A.
March 27.

In re CARTER AND KENDERDINE'S CONTRACT.

Vendor and Purchaser—Voluntary Settlement—Trustee in Bankruptcy of Settlor—Bonâ fide Purchaser for Value—Title—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47; *s.* 48, *sub-s.* 2.

According to the true construction of s. 47 of the Bankruptcy Act, 1883, a voluntary settlement is not void against the settlor's trustee in bankruptcy from its date, but is only void against the trustee from the time when his title accrues; so that if before that time the property comprised in the settlement has been sold, bonâ fide, to a purchaser for value, the title of the purchaser will be good as against the trustee.

In re Brall, [1893] 2 Q. B. 381, and *In re Holden*, (1887) 20 Q. B. D. 43, approved.

In re Briggs and Spicer, [1891] 2 Ch. 127, overruled.

Appeal from North J.

This was a vendors' summons under the Vendor and Purchaser Act, 1874, asking for a declaration that certain requisitions and objections made by the purchaser had been sufficiently answered by the vendors, and that, notwithstanding s. 47 of the Bankruptcy Act, 1883, the vendors could make a good title to certain freehold property comprised in a contract for the sale thereof for value entered into between the vendors and the purchaser. The vendors derived title to the property under certain conveyances by way of settlement executed by former owners of the property and dated respectively March 17 and 25, 1896; and the purchaser objected that these conveyances, being voluntary, were liable to be avoided under s. 47 of the Bankruptcy Act, 1883, and they asked how the vendors proposed to make a good title to the property. The vendors answered that they were able to make a good title by reason of the decision of Vaughan Williams J. in *In re Brall* (1); but the purchaser replied that, having regard to the decision of Stirling J. in *In re Briggs and Spicer* (2), he could not accept this answer; and he suggested that the present summons should be taken out by the vendors, which was done accordingly. The summons was adjourned into court, and came on before North J. on February 11, 1897.

(1) [1893] 2 Q. B. 381. (2) [1891] 2 Ch. 127.

Borthwick, for the vendors. It must be admitted that the settlement was a voluntary one: *Ex parte Hillman*. (1) The question is whether by s. 47 (2) of the Bankruptcy Act, 1883, the settlement is made void as against the settlor's trustee in bankruptcy, or only voidable in the event of a bankruptcy and as from the date of the bankruptcy. Sect. 47 is identical with s. 91 of the Bankruptcy Act, 1869, except that the latter applied only to traders, and that it must now be proved that the settlor's interest in the property passed to the trustee on the execution of the settlement. The cases already decided on s. 47 are conflicting. In *In re Briggs and Spicer* (3) Stirling J. held that the settlement would be absolutely void ab initio as against the trustee in bankruptcy of the settlor, if he should become bankrupt within two years of the date of the settlement, and also if he should become bankrupt within ten years of that date, unless "the parties claiming under the settlement" (which the learned judge held would include a purchaser from the trustees of the settlement before any bankruptcy) could shew that the settlor when he made the settlement was able to pay all his debts without the aid of the settled property. In *In re Vansittart* (4) and *In re Brall* (5) Vaughan Williams J. held that "void" in s. 47 means "voidable," and that a bonâ fide purchaser for value from the donee under a voluntary settlement has a good title against the trustee in the bankruptcy of the

(1) (1879) 10 Ch. D. 622.

(2) Sect. 47: "(1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

"(3.) 'Settlement' shall for the purposes of this section include any conveyance or transfer of property."

(3) [1891] 2 Ch. 127.

(4) [1893] 2 Q. B. 377.

(5) [1893] 2 Q. B. 381.

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settlor, even if he purchased with notice of the voluntary settlement, provided that he purchased before the bankruptcy. In *In re Holden* (1) a Divisional Court held that trustees of a voluntary settlement were, after the bankruptcy of the settlor within the two years, entitled to a lien on the property for their costs incurred in the performance of their duty as trustees in defending an action by the settlor to set aside the settlement. Sect. 47 does not invalidate any dealings with the property which have taken place before the bankruptcy of the settlor. When the settlement is avoided it is not avoided ab initio, but only as from the date of the avoidance.

In *Hance* v. *Harding* (2) the Court of Appeal held, under the Bankruptcy Act, 1869, that a voluntary settlement was protected as against the trustee in the settlor's bankruptcy by s. 94, sub-s. 3, of that Act. The decision of VaughanWilliams J., which is later than that of Stirling J., should be followed.

Eustace Smith, for the purchaser, was not called upon.

NORTH J. There being this conflict between these recent decisions of two judges of co-ordinate jurisdiction, how can I force the title upon the purchaser, even if I had formed an opinion as to which of the two decisions is right? The purchaser is no doubt willing to take the property if he can get a good title to it. If either of the two cases stood alone I should of course follow it, but I cannot follow them both. And I cannot follow one of them, and force the title upon the purchaser in the face of the contrary decision. I must dismiss the summons, the Court being of opinion that the title cannot be forced upon the purchaser.

W. L. C.

C. A. The vendors appealed, and the appeal was heard on March 27 1897.

Cozens-Hardy, Q.C., and *Borthwick*, for the appellants. What the section says is that the voluntary settlement is to "be void against the trustee in the bankruptcy" of the settlor; but this does not affect the title of a purchaser for value where

(1) 20 Q. B. D. 43. (2) (1888) 20 Q. B. D. 732.

there has been no bankruptcy. "Void" does not mean void as against everybody and from the date of the instrument, but only void as against the trustee in bankruptcy, and from the time when his title accrues. Were it otherwise the effect would be startling, particularly considering that the tendency of legislation is to make property more saleable; for the result would be to make property, which is the subject of a voluntary settlement, unsaleable, and possibly derelict for two or ten years, as the case may be. [In addition to the authorities made use of in the Court below, they referred to the statutes 13 Eliz. c. 5 and 27 Eliz. c. 4; *Prodgers* v. *Langham* (1); *George* v. *Milbanke* (2); *Daubeny* v. *Cockburn* (3); *Payne* v. *Mortimer* (4); *Ex parte Bishop* (5); *Halifax Joint Stock Banking Co.* v. *Gledhill* (6); *Sanguinetti* v. *Stuckey's Banking Co.* (7); and *Alexander* v. *Mills.* (8)]

Eustace Smith, for the purchaser. The purchaser is a willing purchaser, but of course desires a title which cannot be upset by the trustee in bankruptcy of the settlor if he should ever come into existence. There is no doubt that this is a voluntary settlement within s. 47; the words of the section are that such a settlement shall, in the event of the settlor's bankruptcy within two years or ten years, as the case may be, after its date, "be void against the trustee in bankruptcy" of the settlor as mentioned in the section. Now, if an instrument is "void," it must come off the title, and, a link in the chain of title being gone, the purchaser has bought from people who have no right to sell. There is nothing whatever in the section to shew from what time the settlement is to "be void," or to qualify the language used; and the primâ facie meaning of an instrument being "void" is that it is to be void throughout its whole existence, i.e., ab initio. There is nothing in the section to protect the purchaser, and his objection is a good one: *In re Briggs and Spicer* (9); *Ex parte Hillman* (10); *In re Ridler.* (11)

(1) (1663) 1 Sid. 133.
(2) (1803) 9 Ves. 190.
(3) (1816) 1 Mer. 626, 638.
(4) (1859) 4 De G. & J. 447.
(5) (1873) L. R. 8 Ch. 718.
(6) [1891] 1 Ch. 31.
(7) [1895] 1 Ch. 176.
(8) (1870) L. R. 6 Ch. 124.
(9) [1891] 2 Ch. 127.
(10) 10 Ch. D. 622.
(11) (1882) 22 Ch. D. 74.

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LINDLEY L.J. I do not think we need trouble you to reply, Mr. Cozens-Hardy, because we have no doubt about the true construction of this section. The point is an extremely important one, and I do not think its importance has been overrated by the appellants. [His Lordship then shortly stated the facts, and continued:—]

The objection taken by the purchaser is a very formidable one if there is anything in it; and one cannot say that there is nothing in it, because the question has arisen already, and Stirling J., in the case of *In re Briggs and Spicer* (1), has held the objection to be so serious that he could not force a similar title on the purchaser. On the other hand, Vaughan Williams J., who has had to consider the question from a somewhat different point of view, has come to the conclusion that the purchaser would get a good title. (2)

The question turns on the construction of s. 47 of the Bankruptcy Act, 1883. That section, first of all, deals with "any settlement," and those words for the purposes of the section include "any conveyance or transfer of property." Then, turning to s. 168, we find a definition of property which is extremely wide and covers property of every description. Therefore, this s. 47 according to its terms hits a conveyance or transfer of property of any sort. [His Lordship then read the section, and continued:—]

Looking at that section, and looking at it with no more than ordinary care, we first find that it does not say that these settlements are to be void generally, or anything of the sort. It says that they will be void "against the trustee in bankruptcy," which is a totally different thing. We must then ask ourselves, how can a settlement be void against the trustee in bankruptcy until there is a trustee in bankruptcy against whom it can be void? That remark leads to this question, "Void," as from what time? That is the whole controversy. The section does not say a word about it. You must look at it with reference to the language and the kind of transaction with which the section deals. Looking at the language only, it seems to me that when an enactment says a settlement "shall

(1) [1891] 2 Ch. 127. (2) *In re Brall*, [1893] 2 Q. B. 381.

be void against the trustee in bankruptcy," it does not mean that it shall be void before there is a trustee in bankruptcy.

Let us consider what the consequences would be if the other conclusion were arrived at. No conveyance or transfer of property which came within the definition of settlement in this 47th section could ever be safely made by anybody if that conveyance or transfer was what is called "voluntary," that is to say, without consideration. Just conceive what that means. Suppose a father gave his son a horse or some money in the funds. That father might of course become bankrupt within two years or within ten years, and, during those periods respectively, the son could not deal with that horse or give a good title to that money in the funds either for value or otherwise. That cannot be the meaning of the section, and yet that would be the result if you construe the words "void against the trustee in the bankruptcy" as meaning void from the date of the transaction which is referred to. To my mind, good sense is shocked by such a startling construction as that.

The construction which appears to me to be correct has been adopted not only by Vaughan Williams J., but by the Court of Queen's Bench in *In re Holden.* (1) There the point arose very neatly. Litigation had taken place between the settlor and the trustee of a post-nuptial settlement; and the trustee had incurred some costs, payment of which the settlor tried to evade. The settlor became bankrupt, and the trustee in bankruptcy claimed the property from the trustees of the settlement. The trustees of the settlement said, what was obvious, that these costs, charges, and expenses were incurred before the trustee in bankruptcy came in, and the Court held that the trustees of the settlement had a lien upon the property for those costs. There is nothing in the Act to carry the title of the trustee in bankruptcy back to the date of the settlement.

That this is the true construction appears to me very much fortified by the fact that you do not find in s. 47 any clause similar to sub-s. 2 of s. 48, which is: "This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the

(1) 20 Q. B. D. 43.

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bankrupt." If my construction is right you do not want it. It would be a strange mode of legislation to say that you can impeach a settlement from the date of its execution even as against bonâ fide purchasers for value without notice. Such a legislation would be at variance with the whole spirit of the bankruptcy law ever since we have had one. I have no doubt that Vaughan Williams J. was perfectly correct, and that in a case like this every bonâ fide purchaser gets a good title. I am of opinion that the purchaser in this case will get a perfectly good title; and in order not to throw a cloud upon it he will pay the costs of the litigation.

A. L. SMITH L.J. I am of the same opinion. This case came before my brother North, who, by reason of there being conflicting decisions by my brother Vaughan Williams and my brother Stirling, sent it here.

I will come at once to the statute, and the sole question is what is the true meaning of s. 47 of the Bankruptcy Act of 1883. Having heard the case argued on both sides, I have no doubt as to the true construction of that section. I read the section in this way: any settlement of property shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy. Void from when? That is the point which has to be determined. On one side it is said it is void ab initio—void from the date of the settlement. Where do you find that? The words are not there. There are other words which point in the contrary direction, and those are the words, "void against the trustee in the bankruptcy." What do they mean? They mean void as against the trustee in the bankruptcy from the date of the accruer of his title, or, in other words, void from the date of the act of bankruptcy to which the title of the trustee relates back. That, in my judgment, is the true construction of that branch of the section. Then it goes on: "and shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy"—exactly the same words again with the exception that the period is enlarged from two to ten

years—"unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." I must say that I do not agree with my brother Stirling that the meaning of the words "unless the parties claiming under the settlement," includes purchasers from the volunteer. I think the meaning of these words in this clause is, "unless the parties claiming under the settlement"—that is, the volunteers when their deed is impeached during the period of ten years—can shew that their settlor was solvent at the time of making the settlement, and so get rid of the claim of the trustee. Reading the section in this way, as has been pointed out by Lindley L.J. and Vaughan Williams J., it is unnecessary to put into s. 47, sub-s. 2 of s. 48 an exception from the operation of the section of purchasers in good faith and for valuable consideration. If it is to be read as Mr. Eustace Smith asks us to read it, it is manifest that that sub-section ought to have had in it the exception about good faith and for valuable consideration, because it never could have been the intention of the Legislature that bonâ fide purchasers for value should have their title impeached by what they have done in good faith. It would be contrary to all the provisions of the bankruptcy law, although, if the other construction is the right one, I think that sub-s. 2 would have been inserted.

For these reasons I prefer my brother Vaughan Williams' construction to the construction of my brother Stirling.

RIGBY L.J. I am of the same opinion. In construing this Act we must, of course, look in the first place to the exact way in which the enactment is expressed. In a certain contingency, i.e., that of bankruptcy happening to a voluntary settlor, a voluntary settlement shall be "void as against the trustee in bankruptcy." It is impossible to construe that as meaning shall be void as against the trustee in bankruptcy for all intents and purposes. It is impossible to treat that as

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avoiding the settlement from the date of it, with the result that would appear to follow, that the trustee might have an account of all rents received, that he might follow the money, if it was money, into the hands of any person who had got it, or follow the land if it were land. Of course, in all these cases the parties would be presumed to know of the Act of Parliament, but it is quite possible they might not know of the voluntary settlement. In all cases in which they did—and that would practically extend to all cases of real estate—they would know that this section might apply, and they would know they were running the risk. I do not think it is possible that the Legislature, which has taken such pains in all other matters to protect the rights of honest dealers, should have left a purchaser under a perfectly honest voluntary settlement entirely without protection, in the event of the bankruptcy within two years or ten years, as the case may be, of the settlor. I think we must construe the section as meaning that the voluntary settlement shall not stand in the trustee's way, that that alone shall not exclude him from laying his hand upon any property comprised in it, so that if the person in possession has no other title than that which is given by the voluntary settlement that title will not avail him against the trustee. I think the reasonable construction is this: that if anything has been done under the settlement, if, for instance, rents have been paid, there can be no account of them—if, going to the extreme, the property has been sold out and out in a bonâ fide way for valuable consideration, the trustee cannot go against the purchaser at all. It appears to me that is the logical result of the decision in *In re Holden* (1); I think it is the fair result of the section itself. If once we admit that *In re Holden* (1) was correctly decided, I do not see where we are to stop. I have not the slightest doubt, in my own mind, that *In re Holden* (1) was correctly decided; and it comes to this, that every equity which has been acquired before the act of bankruptcy, which is the beginning of the bankruptcy, is to be respected, and is not in any way hit or interfered with by s. 47. In *In re Holden* (1) the specific question was whether the

(1) 20 Q. B. D. 43.

trustees who had defended an action by the settlor, and who had become entitled to the costs of the litigation, and who, according to the ordinary rules of equity with regard to a valid settlement, were entitled to a lien on the property for those costs in the event (which happened there) of the settlor not paying them, were to be deprived of that lien because the settlement was a voluntary one. Of course, they could have no such claim if the trustee could go back behind their title. What are trustees? They are only persons who claim under the voluntary settlement. I do not see that their position can be better than that of purchasers. They claim, of course, not as volunteers but as purchasers, in the wide sense of the word, under the voluntary settlement; and, if one set of purchasers is to be protected, I fail to see how you can draw the line and say that another set of purchasers, whether out and out purchasers or mortgagees, or any persons who, on the faith of a settlement, at the time of the dealing acted on that assumption and paid their money, are not to be protected.

I do not think it is necessary to go into the earlier cases; but at any rate they shew to what an alarming extent we should be altering the position of persons dealing with voluntary settlors on the strength of a section of an Act which does not in words give the interpretation sought to be set on it, if we decided the other way.

Solicitors: *Miller, Smith & Bell*; *Gerrish & Foster*.

W. W. K.

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In re A. AND B. (INFANTS). (1)

Infants—Custody—Talfourd's Act (2 & 3 *Vict. c.* 54)—*Custody of Infants Act*, 1873 (36 & 37 *Vict. c.* 12)—*Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 5.

Under s. 5 of the Guardianship of Infants Act, 1886, the Court has, after taking into account the various considerations mentioned in that section, full jurisdiction to override entirely the common law rights of a father in relation to the custody of his infant children.

In "having regard to . . . . the conduct of the parents and the wishes as well of the mother as of the father," the Court will not treat the parents in an unequal manner or differently the one from the other, but will take the whole conduct and wishes of both parents into consideration.

The Court will in a proper case give a mother the custody of her infant children, notwithstanding that the mother may have been guilty of matrimonial misconduct.

APPEAL from Chitty J.

This was a summons taken out in November, 1895, under the Guardianship of Infants Act, 1886, by the mother of certain infants, asking that she might forthwith be allowed access to them, and that they might be placed in the custody of and so as to permanently reside with and under the control of the applicant, or that she might have access to the infants in such manner and under such conditions as to the judge should seem fit.

The summons was served upon the father, and the application was heard by Chitty J. in camera.

The material facts were shortly as follows:—

The father and mother were married in the year 1885. There were three children of the marriage, namely, (1.) a girl born in the year 1886, (2.) a boy born in the year 1890, and (3.) a girl born in the year 1893. All three children were alive, but the present application concerned only the two eldest children: the mother had never been deprived of the custody of the youngest

(1) The materials for this report have been furnished to the reporter by one of the counsel engaged in the case, and the report is published with the sanction of the learned judge of the Court of First Instance, and of the Lords Justices who decided the case on appeal.

child, and the father did not claim to deprive her of such custody.

The father and the mother had each been guilty of adultery, but had condoned each other's offences. The mother had since the marriage contracted the habit of taking intoxicating liquors in excess, but had at the date of the hearing and for upwards of twelve months prior thereto broken herself of that habit.

Both the father and mother were persons of good position. The mother had a sufficient income secured by her marriage settlement; the husband had brought no property into settlement and had no independent means of his own. The parents, both of the father and mother, were persons of considerable wealth. In the month of June, 1895, the father and mother ceased to live together. Since that date the mother had (with the youngest child) resided with her parents, and the two eldest children had resided with and had been properly cared for by the parents of the father.

The mother and her father offered at the bar to undertake that, in case at any time while the infants A. and B. were in the custody of the mother, she (the mother) should not be residing with her parents, she would have a suitable lady relation, friend, or companion to live with her.

Byrne, Q.C., F. Sims Williams, and *Frank Russell,* for the applicant, referred to the Act to amend the Law relating to the Custody of Infants (Talfourd's Act), (2 & 3 Vict. c. 54), ss. 1 and 4; the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), s. 1; and the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), ss. 2, 3, and 5. (1)

(1) The Act passed in 1839 to amend the law as to the custody of infants, and known as Talfourd's Act (2 & 3 Vict. c. 54), enables the Lord Chancellor and the Master of the Rolls respectively, upon the petition of the mother of any infant under the control of the father, or, after his death, of any guardian, to make an order for the access of the mother to such infant, and, if the infant be within the age of seven years, for the delivery of such infant to the custody of the mother until that age, subject to such regulations as the judge shall deem convenient.

By the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), Talfourd's Act was repealed, and it was enacted (s. 1) that it should be lawful for the Court of Chancery upon the petition of the mother "of any infant under sixteen years of age, to order that the

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Levett, Q.C., and *Rowden*, for the respondent, also referred to the statutes and cited *In re Taylor* (1), *In re Elderton* (2), and *Re Steel.* (3)

Cur. adv. vult.

CHITTY J. (after reviewing the facts of and the evidence in the case). At common law the rights of a father to the guardianship and custody of his children were absolute. Eventually these rights were modified by legislation; and, in the first instance by Talfourd's Act (2 & 3 Vict. c. 54), and subsequently by the Custody of Infants Act, 1873, the rights of a mother in this behalf were amended and improved, and she was placed in a quite different position.

Then came the Guardianship of Infants Act, 1886, which made the greatest stride of all in this direction. By that Act the father's rights in relation to the guardianship and custody of his infant children are considerably limited. Sect. 3 is a

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petitioner shall have access to such infant at such times and subject to such regulations as the Court shall deem proper, or to order that such infant shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant shall attain such age, not exceeding sixteen, as the Court shall direct; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant, and otherwise, as the said Court shall deem proper."

By the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), after providing (s. 2) that on the death of the father of an infant the mother, if surviving, shall be the guardian of such infant either alone or jointly with others; and (s. 3) that the mother of any infant may in certain cases appoint a guardian or guardians of such infant after the death of herself and the father, and otherwise; it is enacted in s. 5 as follows:—

"The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just."

(1) (1876) 4 Ch. D. 157.
(2) (1883) 25 Ch. D. 220.
(3) (1889) 33 Sol. J. 659.

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good illustration of this. But for the present application the important section is s. 5. [His Lordship read the section.] This section confers upon the Court in terms a wide discretion as to the custody of and access to infants; but the discretion is a judicial discretion, and must be exercised having regard to the matters mentioned in the section. These are—(1.) the welfare of the infant, (2.) the conduct of the parents, and (3.) the wishes as well of the mother as of the father. On the first point, the position of the third child is very material. It is important for children that they should be brought up in their tender years on terms of affection with one another, and also that they should know both their parents. On the second point there is little to choose between the parents.

On the third point "wishes" is a very wide term. I have carefully considered all the circumstances of this very exceptional case, and, acting in exercise of the discretion given to me, I make the following order: [The learned judge then read the order, of which the following is (with the necessary alterations consequent upon the omission of names) a copy:—]

"This Court doth order that the custody of the said infants be committed until further order to the applicant and respondent each for six months in the year at times to be agreed upon between them, and in default of any agreement as the judge in chambers shall direct, the applicant and her father by their counsel respectively undertaking that while the said infants are in the custody of the applicant they shall be accompanied by their governess, and shall be well cared for, educated, clothed and maintained at the expense of the applicant and her father. And the respondent and his father by their counsel respectively undertaking that while the said infants are in the custody of the said respondent they shall be accompanied by their governess and shall be well cared for, educated, clothed and maintained at the expense of the respondent and his father, the expense of the governess to be borne in equal moieties between the applicant and her father and the respondent and his father. And the applicant and her father by their counsel undertaking that in case at any time while the said infants are in the custody of the applicant she shall not be residing with her parents she will have to live with her a suitable lady relation, friend, or companion. And it is ordered that all reasonable access be allowed to either the applicant and respondent while the said infants are in the custody of the other. Liberty to apply."

The father of the infants appealed. The appeal was heard in camera. C. A.

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Cozens-Hardy, Q.C., *Levett, Q.C.*, and *Rowden*, for the appellant. The Act of 1886, s. 5, only extends the provisions of Talfourd's Act and the Custody of Infants Act, 1873, to infants up to the age of twenty-one years. The Courts have never intervened unless the father's conduct has disentitled him to custody. A father should certainly not be deprived of his rights at the instance of a guilty mother: *Re Winscom.* (1) The Act of 1886 has not placed the father and mother on an equal footing. A father's rights must not be interfered with unless his conduct to the children justifies it: *In re Elderton.* (2) [The following authorities were also cited: *In re Taylor* (3); *In re Agar-Ellis.* (4)]

Byrne, Q.C., *F. Sims Williams*, and *Frank Russell*, for the respondent, were not called upon.

LINDLEY L.J. I do not propose to say anything about the facts of this case; I shall only deal with the order of Chitty J. and the construction of the Act. Chitty J. has come to the conclusion that the children shall spend half the year with the father and half with the mother. The father appeals on the ground that he ought to have the custody of the children, giving to the mother whatever access the Court thinks reasonable, and the only question which we have to consider is whether Chitty J. has exercised his discretion in a way in which he ought not to have exercised it. That again turns on the true construction of s. 5 of the Act of 1886. I do not take the view that Mr. Cozens-Hardy and Mr. Levett have urged upon us—that this section must be read in the narrow way for which they contend. Nobody can read the various sections in the Act without seeing that it is essentially a mother's Act. It has very greatly extended the rights of mothers. I do not say that it has much, if at all, diminished the rights of fathers except as regards mothers; but to say that s. 5 is to have no operation unless the father has so conducted himself towards his children as to justify the Court in depriving him of his children, is to

(1) (1865) 2 H. & M. 540.
(2) 25 Ch. D. 220.
(3) 4 Ch. D. 157.
(4) (1878) 10 Ch. D. 49; (1883) 24 Ch. D. 317.

reduce the section to a nullity; the section might as well be out altogether. What was the section put in for? What did the Legislature want to accomplish? The section was considered necessary, and was inserted because Talfourd's Act and the Act of 1873 as construed by the Courts had not gone far enough in favour of the mother. It was to increase her rights, regard being had of course to the interest of the children. Sect. 5 has nothing to do with the rights of the father except as between him and his children and their mother. Sect. 5 says this: [His Lordship read the section, and proceeded:—]

The section has very materially altered the law relating to the custody of infants, and I am not in the least disposed to say anything that will narrow the ordinary construction of its words. Having regard to them the judgment of Chitty J. is perfectly right, and I can add nothing usefully to it. Unless the appellant's contention can prevail, that the father is entitled to these children unless he has so conducted himself towards them as to forfeit that right, a contention which I protest against, the order is as right and judicious an order as can be made.

LOPES L.J. I agree that, having regard to the facts of this case, which are excessively painful, it is desirable that as little as possible should be said; and in what I propose to say I shall confine myself entirely to the consideration of s. 5 of this Act of 1886.

I think it is worthy of observation that each step in legislation has been to confer privileges on the wife with regard to the custody of and access to her children—to mitigate the severity of the common law has been the object of the Legislature ever since 1839, when Talfourd's Act was passed. In 1839 the jurisdiction of the Court of Chancery was thought to be deficient in many respects, especially in the scanty recognition of the rights of the mother, and the law was amended by Talfourd's Act of 1839. The Act of 1839 was repealed by the Custody of Infants Act, 1873, and that again very much enlarged the privileges of the mother. But in 1886 came the Act in question, the Guardianship of Infants Act; and that again, more than any Act before, increased the rights and privileges of the

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mother, and, in my judgment, s. 5 was inserted expressly for the purpose of increasing and enlarging those rights. Now I come to s. 5 itself. That is the section under which the case arises, and it is said that the learned judge in the Court below has unduly exercised the discretion given to him by that section. Now the words of the section are these: "The Court may, upon the application of the mother" (it is remarkable how the word "mother" pervades this Act) "of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent"—now I come to the important words—"having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well"—mark these words—"of the mother"—she is put first—"as of the father, and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order," and so on. Now, what has the learned judge to do when he is asked to exercise his discretion under this Act? I take it there are three things he must look at. He must look primarily, I am entitled to say, to the welfare of the infant, then to the conduct of the parents, and then take into consideration the wishes—not of the father, which, it is suggested to us, are paramount—"as well of the mother as of the father." Now, having regard to the most painful circumstances of this case, can it be said that those matters have not been properly taken into consideration by Chitty J.? Can it with any reason, or anything amounting to what is right, be urged he has not properly exercised that large jurisdiction? I agree with every word in his judgment. I only desire to adopt his judgment as my own, so thoroughly do I approve of it.

RIGBY L.J. I am of the same opinion. I also shall abstain from saying a word about the facts of the case, and will deal only with the construction of the Act. The Act goes very far indeed in diminution of the rights of the father and in conferring new rights—I will not say equal rights, but new and important rights—upon the mother. Sect. 2 provides that, "On the death

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of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father." That is an alteration of the law. Before this Act the father could appoint a guardian by testament, and that guardian was sole guardian notwithstanding the mother might survive. There is an entire change, as you may call it, in the position both of the father and of the mother. Sect. 3 enables the mother to appoint a guardian after the death of herself and the father—a new right given to the mother. I will not go through the whole of these; but it is evident when we come to s. 5 that a great discretionary power is given to the Court—of course, to be exercised according to judicial considerations, not from motives of sympathy to one side or the other, except as far as the position of things makes it of benefit to the infant that those should be taken into account. The Court is not to forget the rights of the father; but throughout the Act an intention is shewn to modify those rights and cut them down and make them totally different from what they had been at common law or under the previous Acts, and with that in view the Court is to make such order as it may think fit. If it stopped there it might have been a somewhat strong thing to say that the Court could override the rights of the father, though I think there would have been jurisdiction to do so. But when you come to the words that follow there can really be no doubt about it. The Legislature was not content, finding that the other Acts had not gone far enough, simply to give in general terms a discretionary power to make such an order as the Court may think fit. The section goes on to indicate the considerations that must be taken into account by the Court. First of all comes the welfare of the infant. The mere putting of that in the first place may perhaps be said not materially to alter the law, though I think there were cases in which occurred expressions of judicial opinion amounting to this—that first of all you were to look to the rights of the father. At any rate, after this it is impossible to say the rights of the father are to be the first

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consideration of the Court. First you have to have regard to the welfare of the infants, and then to the conduct of the parents. We are invited to cut down those words in such a way as to confine them to such conduct on the part of the father as before the Act would have been sufficient to deprive him of his rights. That would be to make them of no effect, because conduct of that kind was taken into consideration by the Court as long as it had to deal with such matters. As to the conduct of the parents, it appears to me that you have to take into consideration on each side the whole conduct—that is to say, not to treat the parents in an unequal manner and say there are some things on the part of the mother which we should consider decisive, and those same matters on the part of the father are to be neglected altogether. The section does not say, "having regard to the decided cases and the difference between a father and a mother," but they are put on an equality; and I think the Court is bound to take into consideration every circumstance of conduct on the part of the father that it would consider on the part of the mother.

I do not mean to say that it necessarily follows that in the case of husband and wife the same degree of weight would always have to be given to conduct on the part of one parent and of the other. There are some things in which the conduct of a mother is much more important in regard to her children than that of the father, and vice versâ. At any rate, you have to take everything on the part of both parents into consideration, and there is no indication in the Act that you are to treat one differently from the other.

And then you come to the words, "the wishes as well of the mother as of the father." Those are very remarkable. If the rights of the father as they were construed down to that time are not intended to be interfered with by this section, what is the meaning of referring to the mother's wishes? If that means, "to the wishes of the mother subject to the rights of the father," it would be a transparent absurdity; if the rights of the father are to override the wishes of the mother, what is the use of mentioning them? When it says "the wishes of the mother as well as of the father," as a general rule you are to

consult the wishes of one as well as the other. Now, I cannot believe that it is the proper construction of this Act that you are to read into that section "without prejudice to the rights of the father at common law, and as they stand by the decisions down to this time." The Act is intended to interfere, and interfere to a very great extent, with the rights of the father; and I do not hesitate to say that the Court has a wide discretion to deal with those rights in a much more extensive manner than it could do before. It was suggested by Mr. Levett that the Court is bound in all cases where there has been misconduct on the part of the wife to refuse her an order under this section. I find nothing of the kind in the Act. I do find that the conduct of both parties has to be taken into consideration, but I do not find an arbitrary line drawn which should govern the Court and render it incapable of making an order in favour of the mother when there has been matrimonial misconduct on her part.

The 7th section of the Act is not without some importance on the point, because while the Legislature gave to the Matrimonial Court a power—which at any rate had not been given before by statute—of declaring the parent, by reason of whose misconduct a decree was made in the Divorce Court, to be a person unfit to have the custody of the children of the marriage, and went on to say that in such cases the parent, so declared to be unfit, shall not upon the death of the other parent be entitled as of right to the custody or guardianship of such children, they refused absolutely, according to my reading of that section, to treat as final the case of misconduct on the part of the wife. She might have been guilty, she might have caused a divorce, and might have been declared by the Court which had cognizance of the matter guilty of such conduct as to make her unfit for the custody of children; and yet it was left open to her to come to the Court and ask for the guardianship, though she could not claim it as of right. That disposes, I think, entirely of the argument that misconduct on the part of the wife is to be a bar to any relief given to her under the Act. I do not in the least say what might happen if there was misconduct on one side and not on the other; but here

C. A. 1896 *In re* A. and B. (Infants).

that is not the state of things. All Chitty J. had to consider was what was best to do under the circumstances of this unfortunate case; and from every point of view I agree with what he has done. Practically establishing equality in this case between the husband and wife, was the wisest and best thing, and clearly for the benefit of the infants.

Lindley L.J. The appeal is dismissed with costs.

Solicitors for mother: *Day, Russell & Co.*
Solicitors for father: *Lewis & Lewis.*

F. R. and W. W. K.

C. A. 1896 VAUGHAN WILLIAMS J. *Nov.* 18, 20, 26, 30. C. A. 1897 *Feb.* 26; *March* 2, 4, 5, 19.

In re WRAGG, LIMITED.

Company—Winding-up—Liability of Vendors—Purchase-moneys of Vendors' Property—Payment in fully paid-up Shares—Issue of Shares at a Discount—Contract—Apportionment of Value—Stamp Duty—Value of Property purchased—Inquiry into—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Although a limited company cannot release a shareholder from the obligation to pay for his shares either in money or money's worth, and cannot therefore issue its shares at a discount, it can, provided the contract is duly registered under the 25th section of the Companies Act, 1867, buy property at any price it thinks fit, and can pay for such property in fully paid-up shares; and the transaction will be valid and binding upon its creditors if the company has acted in it honestly and not colourably, and has not been so imposed upon by the vendor as to be entitled to be relieved from its bargain.

The value received by the company is measured by the price at which the company agreed to buy the property it sought to acquire; and whilst the transaction is unimpeached that is the only value which this Court can take into consideration.

Decision of Vaughan Williams J. affirmed.

Appeal from Vaughan Williams J.

This was a summons taken out by the official receiver, as the liquidator in the winding-up of the above-named company, in substance for a declaration that certain shares in that company held by Messrs. E. J. Wragg & J. B. Martin and registered in their names as fully paid up were not fully paid up, and for an

order that Messrs. Wragg & Martin should forthwith pay the amounts unpaid thereon.

For many years prior to 1894 Messrs. Wragg & Martin carried on business together as omnibus and coach proprietors, livery-stable keepers and job-masters in Whitechapel, and elsewhere in London; and they were the owners of certain freehold and leasehold property, and a considerable number of horses and carriages, and a quantity of harness, stock-in-trade, plant and effects.

In 1894 they determined to convert their business into a private limited company, and with that intent they formed such a company to buy the goodwill, stock-in-trade, and property of their business at a price which they fixed at 46,300*l.*, to be payable in cash, debentures, and fully paid-up shares as hereinafter stated.

This company was registered on January 9, 1894, under the name of E. J. Wragg, Limited, and with a nominal capital of 20,000*l.* divided into 2000 shares of 10*l.* each.

The objects for which the company was established were stated in the memorandum of association to be, to acquire and take over as a going concern the above-mentioned business and property, and with a view thereto to carry into effect, with such modifications as might be agreed upon, the agreement stated in art. 3 of the articles of association.

Art. 3 of the articles of association provided that the directors should forthwith in the name of the company enter into and adopt an agreement therein referred to which had been already prepared, and a copy of which was identified as being indorsed by two of the subscribers to the articles, but with power to make modifications therein.

In accordance with this article, on January 10, 1894, an agreement was entered into between Messrs. Wragg & Martin of the one part, and E. J. Wragg, Limited, of the other part, by which, after reciting the carrying on of the business of the vendors, the formation of the company with the object of acquiring that business as a going concern, and the provision in the articles as to the agreement in this behalf, it was agreed—First, that the company should purchase as from December 31,

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1893, (1.) the goodwill of the business; (2.) the freeholds mentioned in the 1st schedule; (3.) the leaseholds mentioned in the 2nd schedule; (4.) the coaches, omnibuses, and horses mentioned in the 3rd schedule; (5.) the harness, saddlery, and other machinery, implements, tools, chattels, stock-in-trade and effects in and about the described premises; and (6.) all contracts, engagements, rights, and privileges to which the vendors were or might be entitled. Secondly, it was further agreed that the consideration for the sale should be the sum of 46,300*l.*, which should be paid and satisfied as follows, namely, as to the sum of 7000*l.*, part thereof, in cash (which was expected to be raised by means of first debentures for a total amount of 10,000*l.*); as to 3000*l.*, further part thereof, by the issue to the vendors or their nominees of 3000*l.*, the residue of those first mortgage debentures the whole of which were to be secured by a trust deed; as to the sum of 6300*l.*, by the issue to the vendors or their nominees of a total issue of 6300*l.* second mortgage debentures, to be secured by another trust deed; as to 10,000*l.*, further part thereof, by the company taking over the liability of two mortgages, i.e., a first mortgage for 8000*l.* at 6 per cent., and a second mortgage for 2000*l.* at 5 per cent.; and as to 20,000*l.*, the balance of the 46,300*l.*, by the allotment to the vendors or their nominees of 1993 fully paid-up shares of 10*l.* each, being 2000 less the seven shares allotted to the seven signatories of the memorandum of association. Clause 3 of the agreement was as follows: "The said purchase-money is made up as follows, i.e., 6000*l.* is the value of the goodwill and trade-marks, 12,000*l.* is the value of the freehold hereditaments mentioned in the first schedule, 500*l.* is the value of the leasehold hereditaments mentioned in the second schedule, and 27,300*l.* is the value of the coaches, omnibuses, carriages, horses, moveable plant and machinery, stock-in-trade, and other loose effects; 250*l.* is the value of the contract rights and privileges; 250*l.* is the value of all other property to which the vendors are entitled in connection with the business." The only other provisions which need be mentioned were: Clause 13, that Mr. Wragg should be the first managing director of the company, and should hold office for ten years from the forma-

tion of the company, at a salary of 400*l.* a year; clause 14, that Messrs. Wragg & Martin, and a Mr. J. T. Harrison should be the first ordinary directors until the ordinary meeting of the company in 1895; clause 15, that the company should cause the agreement now being stated or some other sufficient contract to be filed with the registrar at the time when the shares forming part of the purchase consideration should be allotted.

This agreement was executed by the authority of Messrs. Wragg, Martin, and Harrison, its execution by the company was attested by Wragg and Martin; and it was registered as required by the Companies Act, 1867. A supplementary agreement was executed the same day, whereby the solicitors of the company undertook to raise 7000*l.* by first debentures, of which 4600*l.* was to be paid to Martin, 1000*l.* to the credit of the company, and Messrs. Wragg & Martin covenanted to pay the debts of the company out of the residue.

The property specified in the agreement was duly transferred to the company, and the company paid over in cash to the vendors the 7000*l.* which was raised by the issue of the first debentures, and issued to the vendors the debentures, and allotted the fully paid-up shares mentioned in the agreement.

The company afterwards went into liquidation; and at the commencement of the liquidation Mr. Wragg and Mr. Martin were the registered holders of 941 and 891 fully paid-up shares respectively.

The liquidator considered that these shares were improperly issued as fully paid up, and could not properly be so treated, and he accordingly took out the present summons, which was in part a misfeasance summons against Wragg, Martin and Harrison, as officers of the company, under s. 10 of the Companies (Winding-up) Act, 1890.

The summons asked that it might be declared that the respondents Wragg, Martin and Harrison were jointly and severally liable to contribute to the assets of the company 8910*l.* as compensation for their misfeasance whilst respectively directors of the company, Martin in accepting, and Wragg and Harrison in issuing, or permitting to be issued, to Martin 891 10*l.* shares in the company in respect of the promotion thereof,

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and without any payment or consideration; and that it might be declared that Wragg, Martin and Harrison were liable to contribute towards the assets of the company a further sum of 500*l.* as compensation for their misfeasance while respectively directors of the company in issuing or causing to be issued to Ada Elizabeth Browning, as nominee of Martin, fifty shares in the company in respect of the promotion thereof without any payment or consideration being made or given therefor either in cash or otherwise.

Then by amendment the summons proceeded to ask that it might be declared that Wragg, Martin and Harrison were liable to contribute to the assets of the company the sum of 9410*l.*, as compensation for their misfeasance while respectively directors of the company, Wragg in accepting and Martin and Harrison in issuing or permitting to be issued to Wragg 941 10*l.* shares in the company without any payment or consideration; and that Wragg, Martin and Harrison might be ordered within four days after service respectively to pay these three sums of 8910*l.*, 500*l.*, and 9410*l.*

The summons also asked in the alternative that it might be declared that the nominal amount of 891 10*l.* shares standing in the name of Martin, and 941 10*l.* shares standing in the name of Wragg, and one 10*l.* share standing in the names of Martin and Wragg, were unpaid; that Martin and Wragg were respectively liable to pay the nominal amount of such shares respectively, and that they might be ordered to pay such amounts within four days after service of order; and, lastly, that it might be declared that Harrison was liable to contribute the sum of 100*l.* for his misfeasance in accepting ten 10*l.* shares in the company, and might be ordered to pay such amount within four days after service of the order.

In support of this summons the liquidator produced a certificate signed by Wragg and Martin as directors of the company, and countersigned by one Browning as secretary, which shewed that on the stocktaking of January 1, 1894, there was stock-in-trade of the value of 15,375*l.* and no more; and the liquidator also put in evidence a book belonging to the company containing entries headed "Purchase of Business," upon the

debit side of which was entered: "1st Jan., 1894. To vendors, 36,230*l.*" (reckoning apparently without the 10,000*l.* mortgages), and on the credit side was entered, also reckoning without the mortgages:—

		£
"2nd Jan. 1894.	By stock	15,375
	Goodwill	6,000
	Do.	500
	Premises "leasehold" . .	500
	Fixtures and plant . . .	208
	Premises "Freehold account"	2,000
	Balance to goodwill, &c. . .	11,647
		£36,230"

The accountant who made these entries was called, and upon being asked to explain this last entry, said that he found there was a sum of 11,647*l.* to be accounted for, and so he entered it in this way.

This summons was adjourned into court, and was heard before Vaughan Williams J. on November 18, 20, 26, 30, 1896.

Sir R. B. Finlay, S.-G., Buckley, Q.C., and *Howard Wright*, for the applicant.

Herbert Reed, Q.C., and *Ward Coldridge*, for the respondents Martin and Wragg.

Carrington, for the respondent Harrison.

VAUGHAN WILLIAMS J. This is a very difficult case, but I do not know that I should do any one any good by taking further time to consider it. [His Lordship then stated the terms of the summons, and continued:—]

Now it will be seen that there are joined in this summons a claim in respect of misfeasance by the respondents as officers of the company, under s. 10 of the Act of 1890, and also a claim for a declaration of liability in the respondents, not as officers of the company, but as holders of shares. It is said that you ought not to join two summonses or two charges of a different character in one summons in the way in which it is done here, and I do not think you ought—that is to say, I do not think

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it is in accordance with practice that you should do so, and I do not think it is convenient to do so; and if I thought that the respondents here were in any way embarrassed or put in a worse position by this having been done, I certainly should insist upon the official receiver electing whether he would proceed with the misfeasance clauses of the summons, or whether he would proceed with the clauses of the summons which pray for a declaration of liability in the respondents as holders of shares only. But I am of opinion that the respondents are not embarrassed at all. I think, on the other hand, that it is rather a convenient thing for them that this summons does embrace all that it does embrace. The facts which go to support both branches of the summons are a single transaction, and, that being so, it is much better that there should only be one hearing, and that upon that one hearing the official receiver should ask for any legal remedies that he likes.

Another preliminary objection is taken to this summons, and that is that even if you get over the misjoinder objection, it is wrong that the official receiver should seek by summons to obtain a declaration of the liability of shareholders to pay up these amounts on the basis of their shares being unpaid to the extent of the amounts claimed. Here again I agree with Mr. Reed that to take out such a summons as this is not in accordance with the ordinary practice. One gathers from the Act of Parliament and the rules that the ordinary course contemplated by the Legislature and by those who drafted the rules was that the liquidator in a compulsory winding-up should make out a list of contributories, and that thereupon the liability of persons as shareholders should be tested upon an application to remove their names from the list. The liquidator may, if he thinks fit, bring his action for calls. In truth and in fact, in the present case no calls have been made whatever. You may do one of three things: put persons on the list of contributories, in which case there may be an application to remove, or attempt to enforce payment of the calls in the liquidation, or attempt to enforce payment by action. Those are the ordinary modes. But I know of no reason why one should not in a convenient case allow the application to be

made in the form in which it is made here. A declaration of the rights of the official receiver and the liability of this class of people is asked for; and it seems to me that when there is a class of people sought to be affected in this way, it is not at all an inconvenient thing that the official receiver should try and enforce the liability by getting a declaration of the sort asked for here, and that if he gets the declaration he should proceed to enforce the liability. The Court, at all events, has jurisdiction to make such a declaration, and I am not going to stop the case on this technical ground: it would be no mercy either to the liquidator or to the respondents. The parties are here now, and it seems to me to be to the interest and convenience of all parties that the matter should be disposed of. But the consequential relief asked for is wrong. At present no calls have been made, yet I am asked to say that the total of these sums is to be paid up forthwith. That is a mere matter of detail, and can be put right when the order comes to be drawn up.

Now I will deal first with the misfeasance branch of the summons. With regard to that, I think the official receiver is in a very great difficulty, because in my judgment a misfeasance summons can only be supported where it is shewn that the misconduct of the officers has diminished the assets of the company, and where the respondents can properly be ordered to contribute damages or a sum of money. If there is no sum of money or there are no damages which the respondents can be ordered to contribute or pay, it seems to me that the summons ought to fail. The Solicitor-General in his argument really admitted as much—that is to say, when pressed upon the subject whether he could support this summons, he practically admitted that he could not support it unless he could shew that there was damage, and he practically admitted that he could shew no damage here, because, if the shares in fact and in law are fully paid up, then it follows necessarily that there has been no damage at all. If the shares in fact and in law are not paid up, there is primâ facie no damage, because the holders of the shares are liable to pay up in full, and the assets will be just the same as if the shares had never been issued as fully paid.

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There is no suggestion here that there is any insolvency in any of the persons who received these fully-paid shares. One could conceive a case where, fully-paid shares having been wrongfully issued by the directors to an insolvent holder, the liability of that holder to pay up in full would not go much to swell the assets of the company; but there is no such suggestion in the present case.

Then, as to the second branch of the summons, it is said that the respondents are liable either because there was no registered agreement within the meaning of s. 25 of the Act of 1867, or because the issue of the shares was wholly or partially without consideration. Now, first, with regard to the contention that there was no registered agreement. The agreement between the vendors and the company has, in fact, been registered, but it is said that the so-called agreement is not an agreement within the meaning of s. 25, because it was not made between independent legal entities, or between bodies or persons between whom bargaining was possible. This independence was negatived, it is said, by the vendors and shareholders being the same persons, and it was contended by the Solicitor-General that it followed that there was no real agreement which could be registered, and *Smith* v. *Brown* (1) was cited as an authority for this proposition. I, however, do not think the judgment of the Privy Council delivered by Lord Hobhouse in that case is meant to affirm that there can be no real agreement between vendors and a company the shareholders of which are identical with the vendors. I suppose that if the Court arrived at the conclusion that there could be no real agreement between such parties which was capable of registration, it would also hold that there was no real agreement for any purpose. It seems to me that so to hold would be inconsistent with the decision of the House of Lords in *Salomon* v. *Salomon & Co.* (2), in which case the House held that the vendors and the company were distinct legal entities capable of contracting, notwithstanding the fact that the shareholders of the company consisted of the vendor and his family. The House of Lords, although it decided that I was wrong in holding that the true contract was

(1) [1896] A. C. 614. (2) [1897] A. C. 22.

a contract between principal and agent and not between vendor and purchaser—wrong, that is, in going behind the form of contract—never suggested that I was wrong in holding that the vendor and the purchasing company were distinct legal entities, although unless they had been distinct legal entities they could no more have stood in the relation of principal and agent than in that of vendor and purchaser. It seems to me that the so-called agreement, which the Privy Council in *Smith* v. *Brown* (1) said could not be registered because it was unreal and not made between independent parties capable of a bargain, was the resolution of the syndicate, and not the agreement with the company which never was registered. I wish just to call attention here to a fact or two in the Privy Council case. It will be observed that the particular resolution, or so-called contract, which was registered was a resolution or contract of July 30, 1888. The company was not, in fact, incorporated until August in that year—certainly not before August 8, which is the date of the memorandum of association—and Lord Hobhouse when he comes to give judgment says (2): "The only document purporting to be an agreement which has been registered in the present case, and the only document, therefore, which it is necessary to consider, is that of July 30, 1888. The Courts below regard it as a contract sufficient to comply with the exigencies of s. 57 of the Act of 1874. In the opinion of their Lordships, that document is not a contract in any proper sense of the word. It is nothing more than a resolution by certain persons interested in a mining property setting forth the manner in which they proposed to put the property before the public. It does not create nor was it intended to create any legal rights, duties, or obligations as between the persons expressed to be parties to it. It was a contract in form only. The persons interested in the property and the shareholders in the company to be registered were just the same persons over again in a different guise; they had, as stated above, already distributed the whole of the share capital among themselves. In *Hartley's Case* (3) there was a genuine sale and a genuine

(1) [1896] A. C. 614. (2) [1896] A. C. 623.
(3) (1875) L. R. 10 Ch. 157.

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purchase and a genuine bargain to pay the price by paid-up shares issued to the vendor, who could enforce the bargain under peril of annulling the sale." It may be difficult to reconcile the judgment in this case with the judgment in *Hartley's Case* (1), unless one treats the judgment in the way in which the Solicitor-General invited me to treat it; that is to say, as a judgment based upon the fact of the identity of the vendors and the shareholders, because in *Hartley's Case* (1) and in the present case that which was registered was a document which came into existence prior to the formation of the company. In *Hartley's Case* (1) and in this case there was a trustee interposed; but at the same time Lord Hobhouse does say in his judgment that the document is not a contract, but nothing more than a resolution by certain persons interested in the mining property setting forth the manner in which they propose to put the property before the public, and which does not create, nor was intended to create, any legal rights, duties, or obligations as between the persons expressed to be parties to it, but a contract in form only. Now I understand Lord Hobhouse to lay down a complete proposition there wholly independent of what follows. It is true that he proceeds to state that, "The persons interested in the property and the shareholders in the company to be registered were just the same persons over again in a different guise; they had, as stated above, already distributed the whole of the share capital among themselves." I do not understand that Lord Hobhouse means that that identity between the vendors and the shareholders of the company is essential to the conclusion which he had already arrived at, that there was no real contract intended to be acted upon at all. It is a fact which is consistent with it, but it does not seem to me that it is essential to the conclusion arrived at by Lord Hobhouse. All I can say is, I do not so read Lord Hobhouse's judgment, and, if Lord Hobhouse's judgment does mean that, I can only say that it would lead to most inconvenient and dangerous consequences. It may very well be that one ought to arrive at conclusions although the consequences may be dangerous and inconvenient; but it is not a conclusion

(1) L. R. 10 Ch. 157.

which has ever been arrived at as yet. There have been probably in the last twenty-five years an enormous quantity of private companies formed in which the partners in the business which was sold and the shareholders in the new company have been identical. It is a very usual way of dealing with a business, and the truth of the matter is that the more valuable the business is the more often does this in practice happen. Two partners in a first-rate business do not want, because they are converting their business into a public company for convenience of administration and distribution of profits and liabilities, to let strangers or outsiders into a share in the business; and the consequence is that in all probability, if you were to take a list of the private companies in existence at the present moment, you would find that their solvency compared very favourably with that of the solvency of what are ordinarily spoken of as public companies as distinguished from private. I say, therefore, that I should be most reluctant to come to the conclusion that Lord Hobhouse meant to enunciate a new doctrine which is so inconsistent with the views that commercial people, whether lawyers or not, have heretofore taken of the formation of "private" companies, using the term in its popular sense, under the Joint Stock Companies Acts. I think that this contention, that the vendors and the company are not independent legal entities capable of a bargain in any case in which there is identity of vendors and shareholders, is wrong, and I not only think that, but I think that even if the view taken of the judgment of Lord Hobhouse is right (that is the view put forward by the Solicitor-General), yet I should not be bound to follow it, because the decisions of the Judicial Committee of the Privy Council do not technically bind me sitting here. I am bound, if the decision of the House of Lords and the decision of the Judicial Committee differ, to obey the decision in the House of Lords and disregard the decision in the Privy Council. The Solicitor-General called my attention to the fact that the eminent judges constituting the House in *Salomon* v. *Salomon & Co.* (1) and constituting the Judicial Committee in *Smith* v. *Brown* (2) were practically identical; but it makes no difference: the two

(1) [1897] A. C. 22. (2) [1896] A. C. 614.

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bodies are distinct legal entities, and under those circumstances I cannot pay any attention to the fact that the persons composing the two bodies were the same on this particular occasion.

I do not think that I need say anything more about this part of the case, except that I think that there was a contract here which was capable of being registered under s. 25, and I do not assent to the argument that the identity of the vendors and shareholders prevents the registration, and, the contract having in fact been registered, it seems to me that the section has been complied with. But this of course does not dispose of the whole case. The 25th section of the Act of 1867 is a restrictive and not an enabling section. The Courts having put upon the Companies Act, 1862, such a construction that while it was held that it was an indispensable condition of limited liability that the shares should be paid up by those who took them, yet you might pay up in kind, then came s. 25 of the Act of 1867, which says you shall not be allowed to pay in kind unless you have filed the agreement pursuant to that section. Here I say that the agreement has been filed pursuant to that section; but that does not dispense with the necessity of real consideration being given in order to comply with the Act of 1862. There remains the fact that the nominal amount of shares must be paid either in cash or in kind, and no device can get rid of this obligation. The proposition that it is ultra vires to issue shares except as against a consideration equivalent to the amount mentioned on the face of the shares will probably not be disputed; nor can it be disputed since the decision—in *In re Eddystone Marine Insurance Co.* (1), in which case the decision of Wright J. was affirmed by the Court of Appeal—that in any case in which shares really are issued without consideration the holder of those shares will remain liable to pay up the face value, notwithstanding the filing of a contract under s. 25 of the Act. The head-note of that case is: "A company limited by shares, formed under the Companies Act, 1862, has no power to issue shares as fully paid up, as a free gift or bonus, to its shareholders, although a contract to do so has been made without

(1) [1893] 3 Ch. 9.

any fraudulent intent and registered under s. 25 of the Companies Act, 1867." That case of course falls a very long way short of that which it is necessary for the official receiver to establish here. This is not a case in which there was a sham contract. In the *Eddystone Case* (1) the contract purported to be a contract to issue the shares in respect of past services, and the Court held that there were no real services rendered whatever, and that notwithstanding the so-called contract the shares were a mere gift. I should say here that as a fact there was no difficulty in arriving at this conclusion, because the very contract which was registered really was an intimation of what the true character of the bargain was; whereas in the present case there is a real contract and real consideration passed from the vendors to the company.

In the present case these gentlemen, being interested in different ways in the business of a livery-stable keeper and in the plant which was used for that business—it does not matter how they were interested; I believe there was no partnership deed, but they were so interested that they were minded to act together in disposing of the property—proposed to dispose of the property by promoting and forming the company of which it was intended that these gentlemen should be the shareholders. Having promoted and formed this company, the contract of January 10, 1894, was entered into immediately after the formation of the company between Wragg and Martin of the one part, and Wragg and the company of the other part. In truth and in fact Wragg and Martin made this contract as the representatives of the other persons who were interested in the business. The contract in question is for the sale of what is described generally as the goodwill and business premises, and the horses, carriages, and plant which are described on the contract as being the properties mentioned in the 1st, 2nd, and 3rd schedules to the contract. The freeholds are in the 1st schedule, and the leaseholds in the 2nd, and then follow the horses and carriages in the 3rd schedule. The price was 46,300*l.*, payable as to the sum of 7000*l.* in cash, 3000*l.* in first mortgage debentures, part of the total issue of 10,000*l.* mortgage

(1) [1893] 3 Ch. 9.

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debentures, 6300*l.* by the issue of second mortgage debentures; as to 10,000*l.*, by the company taking over certain mortgage liabilities of the vendors; and lastly, as to 20,000*l.*, the balance of the said sum of 46,300*l.*, by the allotment to the vendors or their nominees of 1993 fully paid-up shares of the company.

Then the contract allocated the 46,300*l.* among the considerations thus to be transferred, because it says the said purchase-money is to be made up as follows: 6000*l.* is the value of the goodwill and trade-marks, 12,000*l.* is the value of the freeholds, 500*l.* the value of the leaseholds, 27,300*l.* the value of the coaches and horses and other loose effects, 250*l.* is the value of the contract rights, and 250*l.* is the value of all other property which the vendors are disposing of. Such is the contract. When the accountant came to open the books he wished to see vouchers of some sort of the various sorts of property or capital with which this company was beginning business, and he asked for particulars of the coaches, omnibuses, and horses. That is the part of the transferred property to which 27,300*l.* is allocated out of the 46,300*l.* He seems to have been given a document which has been before me which purports to state what was the value of this stock on January 1, 1894. It appears by that document that the value as on January 1, 1894, was 15,375*l.*, and the auditor being embarrassed at finding stock to the purchase of which 27,300*l.* was appropriated, looked about him to see how he should open the books consistently with this statement. If the valuation had taken place at the end of the first year, possibly the difficulty might have been met by writing it off as depreciation; but it did not take place then; it took place at the beginning of the year, and he dealt with it by introducing a fresh item, "Balance of goodwill," and then putting in the horses, carriages, harness, &c., at substantially the 15,375*l.* There is some small difference in the figure, but I do not want to trouble myself as to ascertaining it exactly. Now that the company has gone into liquidation, the official receiver seeks to say that there is an absence of consideration for the issue of the fully paid shares to the extent of the difference between the 15,375*l.* and the 27,300*l.*, and he of course can only apply that to the shares

actually issued, the total number of which was 20,000. I think that I ought to find what as a fact the truth is about this document. In my judgment I ought on this evidence to hold that this is a document which represents the state of this stock immediately before this contract, and I think that I ought to hold that the facts as to the amount of this stock were known to the vendors, and also known to the directors of the company.

I was going to deal with the principles which have been laid down in the cases in which the Court has thought itself justified in saying that there was no consideration really passing, although there was a formal contract under which that consideration purported to pass; but before I go on with that, as I have thus stated the facts of the case, perhaps it is more convenient that I should at once say that I do not agree with the contention of the Solicitor-General that on these facts the official receiver is entitled, if the general contentions of the Solicitor-General are right, to have these shares treated as to eleven-twentieths as unpaid. It seems to me that if he is right, it is eleven-forty-sixths and not eleven-twentieths, because, according to my judgment, there is an entire contract for the sale of the realty, the leaseholds, the goodwill, and the stock and plant for 46,300*l.* It is true that the parts of that 46,300*l.* are appropriated to each one of these items, the amounts appropriated being set forth. But still there is only one contract. I do not think that one is entitled to say that the fully paid shares were issued as payment for the stock of carriages a bit more than I have a right to say that they were issued in payment of realty, or in payment of leaseholds, or in payment of goodwill. I think that the whole price—46,300*l.*—was paid for an entire consideration; and it seems to me, therefore, that one ought not to say eleven-twentieths, but ought to say eleven-forty-sixths. This is rather an arithmetical than a legal question, and I need not trouble with the matter any further.

Going back to the principles I have already pointed out, I may say that in the *Eddystone Case* (1) absence of any real consideration was not only found as a fact by the Court, but practically appears upon the face of the contract; and that

(1) [1893] 3 Ch. 9.

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case is very different from the present case, in which substantial property of great value passed under the contract. The question which I have to decide is whether, in a case where there is a real contract, and real consideration is transferred against fully paid shares, the Court will go behind the contract, and say that the consideration transferred is a sham to the extent that the price given exceeds what the vendor and the company must have known to be the value of the property transferred. Now, to assist me with regard to this matter, several cases have been cited. The first is *In re Almada and Tirito Co.* (1) That was a case in which the application was by shareholders in a going company for rectification of the register, and in which the 1*l.* shares had been issued at a discount, really being issued for 2*s.* a share, the resolution being "that the capital of the company be increased from 210,000 shares of 1*l.* each to 420,000 shares of 1*l.* each, by the issue of 210,000 shares of 1*l.* each, credited with 18*s.* per share paid, with a deposit of 6*d.* a share," so that it appeared on the face of that contract that the company was doing that which was ultra vires, because they were issuing these shares at a discount. When Cotton L.J. had disposed of the actual case, he said in his judgment (2): "It was asked in the argument, 'How can you measure the value of the goods which are to be given and to be taken in payment of the shares?' If the contract does define the value, then, unless the contract is set aside as fraudulent, that will fix the shares as paid up, the contract being that a certain property or quantity of goods is to be taken in payment in full of the shares of the company. But suppose in such a case there was a contract that the person taking the shares should give to the company goods or an acre of land fixed by the contract and admitted by the parties as worth, not the amount of the shares, but only 10*s.*, then, although it does not arise for decision here, I in no way intimate any opinion that if such a company were wound up, a person who took shares on an admission that he was only giving half their value would not be held liable for the remainder, as a sum which, on his own admission and on the contract on which he took the shares, must be considered

(1) (1888) 38 Ch. D. 415. (2) 38 Ch. D. 423.

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as only payment of part of the amount of the shares, leaving the other half unpaid, and therefore to be called up if there was a winding-up. That we have not to decide."

I confess when I read that passage I thought, when the Lord Justice used the expression "fixed by the contract and admitted," that he meant "or admitted"; but I have come to doubt whether I was right myself, because the case put by the Lord Justice, which he says he has not to decide, is a different case from that which he was deciding and had to decide, unless in this, that in the case he was deciding and had to decide that which was the sole issue or consideration was shares in a company, but in the hypothetical case that he puts what was sold was goods—"goods or an acre of land," he says. Therefore the case is different; and, when one comes to see that, he makes exactly the same statement in the second part of the sentence, where he uses the words, "as a sum which on his own admission and on the contract on which he took the shares." I doubt whether I am right in saying that he meant "or" there. I am inclined to think that we must take it that he meant "and." My attention was called to what Lord Macnaghten said in *Ooregum Gold Mining Co. of India* v. *Roper*. (1) But I will first read what Lord Watson says (2): "A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would

(1) [1892] A. C. 125. (2) [1892] A. C. 136.

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doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined." And then when Lord Macnaghten comes to give judgment he says (1): "But I desire to protest against some of the propositions which were advanced in connection with this part of the argument. It was said that if a company limited by shares owes its bankers 1000*l.*, and its shares are at 50 per cent. discount, fully paid shares of 2000*l.* nominal value may be given in discharge of the debt. It was said that a company limited by shares may issue fully paid shares at their market price at the time, however much they may have become depreciated, in exchange for goods having a recognised market value. Speaking for myself, I am not prepared to assent to either of those propositions without further argument. I am inclined to agree with the view expressed by Cotton L.J., though it is not necessary to decide the point"—that is, the view of Cotton L.J. in the *Almada and Tirito Case* (2)—"It seems to me that all that has been determined so far is that the Court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price for their property."

I believe now that I have called attention to the main passages in all the judgments that refer to this matter. One starts with the *Eddystone Case* (3), and then there is the *Almada and Tirito Case* (2), and then come the observations of the noble Lords in the *Ooregum Case*. (4) The conclusion which I draw from these cases is, that the Court will not limit itself to a case where there is no consideration whatever, like the *Eddystone Case*. (3) I believe that the Court ought to go into the question of whether there is real consideration or whether the consideration is a sham, not only in the case where the whole consideration is impeached, but in the case where a part of the consideration is impeached;

(1) [1892] A. C. 148.
(2) 38 Ch. D. 415.
(3) [1893] 3 Ch. 9.
(4) [1892] A. C. 125.

but whether it is the whole that is impeached or whether it is a part that is impeached, in my judgment you can only impeach it in cases where the evidence justifies you in saying that, quâ that part of the consideration, the transaction is a sham—that the transaction is a colourable one.

I should be very loth to hold that because there is a contract which recites a perfectly valid consideration the Court may not in a winding-up, where the interests of the creditors are involved, go behind that contract, and say the so-called consideration is a colourable consideration and a sham. I propose, therefore, to put to myself this question. Am I bound to come to the conclusion that this consideration, so far as it relates to the 11,000*l.* parcel of 27,000*l.*, is a colourable consideration in any shape? Well, it seems to me that, making all these assumptions in favour of the official receiver, there is very great difficulty about it. I do not know in the least what it was that fixed the sum of 46,300*l.* here; but I suppose that it was the will of the vendors, and the vendors offered it to the company for this amount, and I am told that it now appears that the horses and carriages were not of the value of 27,000*l.*, but they were of the value of 15,000*l.* only. It may be so in point of fact; but I do not know—there is nothing to shew me—that the goodwill was not undervalued, and there is nothing to shew me that the freeholds or leaseholds were not undervalued. I do not know. Supposing the vendors had not been themselves directors of the company, it might very well have been that those who were advising the company might think it a good bargain to give the 46,300*l.*, never mind how the money was distributed. I do not know the relations between the vendors themselves. It may be, for aught I know, that some of them were interested in the realty, some in the leaseholds, and some of them in the horses and carriages, and the vendors may have thought it convenient, for the purpose of the adjustment of their own rights, to say, "We will put 27,000*l.* out of this total of 46,300*l.* against the horses and carriages, because the vendors A. and B. are interested in the horses and carriages, and that is as between us, the vendors, the amount of their interest, and we will put 19,000*l.* on the realty and the goodwill." The real truth of the matter is that

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so long as the purchasers were willing to pay 46,300*l.* for the things included in the sale, it was nothing to them how the vendors chose to have the sums distributed—the vendors might have the sums distributed just as they chose. Then it is said, "Oh, but that is not an answer, because the stock is shewn to have been of this value to the knowledge of both contracting parties." Well, I assent. I have already said I think there is evidence of that, but it does not seem to me that that is in the slightest degree material. The vendors for their own purposes preferred to have the consideration, the price, appropriated in this manner, and I do not know any reason why they should not do so. At all events, it seems to me that in a case where there is substantial property transferred and a price appears in the contract, and that contract has been acted on and the property parted with, where you cannot rescind the contract and restore the parties to their pre-contract position, you ought not to say that there was no consideration unless it is proved, and proved beyond all reasonable doubt, that the shares thus issued as fully paid were issued as a gift or a bonus to the vendors. The learned counsel who prepared the summons seems to have been impressed with that himself, and he seeks to allege it in the summons by saying that these fully paid shares were issued for promotion money. There is no evidence of that; and when one considers what was likely to actuate these very persons who were making the contract, and not leaving out of consideration their personal identity, it is clear they had nothing to do but to fix whatever price they thought right, and that price of course would be accepted. There was no need to allocate the price in the way in which it is done in this contract, and so doing would in no way assist the directors in carrying out any dishonest purpose, or in cloaking any gift, or in cloaking the payment of any promotion money. Under those circumstances it seems to me that it is a wrong inference to draw that this was either a gift or promotion money. I do not believe it in fact. If I am asked why the vendors, who had it in their power to sell without more this property for 46,300*l.*, allocated it in the way in which they did allocate it in the contract, I say the inference I draw is that they did it for the purpose of adjust-

ment of the price amongst themselves. It is said that these directors might have gone into the witness-box and explained this if they chose, and it is said that they did not, and they have not, and they are not entitled, it is true, to ask the Court to draw the same inference that it might have drawn if they had gone into the witness-box and given satisfactory evidence; but, on the other hand, the official receiver is not entitled to say, because these respondents have not gone into the witness-box, "Be good enough to draw an inference that the issue of this excess, as it is called, of 11,000*l.* of shares was an issue of bonus shares, or an issue of shares to cover promotion money, or for some other illegal purpose." The official receiver is not entitled to ask me to draw that inference from the mere absence of the respondents from the witness-box unless the evidence already makes out such a case as to entitle me to go behind the contract at all. Primâ facie, I am not entitled to go behind the contract. The contract on the face of it is a perfectly unimpeachable contract, and it is for the official receiver to shew that he is entitled to go behind it before he can place any such reliance upon the absence of these people from the witness-box, and it seems to me under those circumstances that I ought not to draw the inference that I am invited to draw.

I think, therefore, that the official receiver has failed to make out in fact in the present case that the consideration was to the extent, as has been contended, or to any extent, a sham. I think there was a real contract for sale at 46,300*l.*, and that the only way of getting out of this is either to succeed in maintaining the argument that there could be no contract between the vendors and the company in this case because of the identity of the vendors and the shareholders, or if you do not do that, the only other way that you can do it is to shew that, as to this 11,000*l.*, the consideration is a sham or a colourable consideration. I myself think that these people in law were independent contracting parties. Speaking for myself, even where you have got independent contracting parties, I should have been disposed to hold that you might go behind the contract and shew that the true relation of the parties was not that of vendor and purchaser, but something else; and this is done occasionally, at

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all events, because in cases of bills of exchange, for instance, where you have got an accommodation acceptance on the face of the contract, the acceptor is the principal debtor; but not only as between the holder and the acceptors, but as between drawer and acceptor, you can go behind the contract and shew what the true relation was in spite of the contract. But that is a very different thing from saying, as is really suggested here, that you are entitled, in the absence of proof of a transaction being a sham or a colourable transaction, to go behind the contract, and to make a new contract for the parties under which the property is to be taken over at a different price from that in the contract.

Under these circumstances I think that the official receiver has failed. I do not think that he has either made out that there was no contract because of the want of independence of the parties, nor do I think that he has made out that this contract in fact was colourable or a sham; and that disposes of the whole of the second branch of the summons. For the reasons that I have already given, I do not think that it can be said that the decision in *Smith* v. *Brown* (1) shews that there was no contract here which could be registered, and I have already dealt with the misfeasance part of the summons. The summons will be dismissed with costs.

F. E.

C. A.

The liquidator appealed. The appeal was heard on February 26, March 2, 4, 5, 1897.

Sir R. B. Finlay, S.-G., Buckley, Q.C., and *Ingle Joyce*, for the appellant. The question is whether the shares issued to Messrs. Martin & Wragg can be treated as fully paid up, and we contend that they cannot be so treated. The point is new in point of decision, but the principles which are applicable to it have long been laid down.

In many cases it might be a matter of some difficulty to shew that a property consideration given by vendors for fully paid-up shares was not a fair equivalent for the shares; but in

(1) [1896] A. C. 614.

this case the vendors themselves have supplied the evidence. Under clause 3 of the agreement of January 10, 1894, the stock-in-trade of the vendors was to be taken as of the value of 27,300*l.*; but on January 1, 1894, the vendors themselves signed a certificate that the stock-in-trade was then of the value of 15,375*l.* and no more; and one of the books of the company contains an entry headed "Purchase of Business" of the same date, which fixes the value of the stock-in-trade at the same amount. It must, therefore, be taken to be established as between the vendors and the company that what the company were to pay 27,300*l.* for was estimated by the vendors to be worth only 15,375*l.*, i.e., 11,925*l.* less. This same "Purchase of Business" account, moreover, after entering the value of the goodwill at 6500*l.*, finishes with entering 11,647*l.* to "Balance of Goodwill Account," which entry, having regard to the evidence, must be a fictitious one, made in order to bring up the total, less the 10,000*l.* for mortgages, to the nominal amount of the purchase-money.

So that, taking it in round numbers, disregarding the 10,000*l.* for the mortgages, and treating the price to be paid by the company as 36,300*l.*, according to the vendor's own statement, the company get stock-in-trade, 15,375*l.*; goodwill, 6500*l.*; leaseholds, 500*l.*; fixtures, 208*l.*; and freeholds, 2000*l.*—total, 24,583*l.*; and they gave 20,000*l.* in shares, 7000*l.* in cash, 3000*l.* in first, and 6300*l.* in second debentures—total, 36,300*l.* This brings out a deficiency of over 11,000*l.*, which can only be attributed to the shares; and consequently, to that amount the shares which were issued to the vendors as fully paid up were not fully paid up either in money or in money's worth.

Now the liability of shareholders to pay for their shares was not imposed by the Companies Act, 1862. It has always existed. What the Act of 1862 did was (s. 7) to limit the liability to the amount (if any) unpaid upon the shares: *Oakes* v. *Turquand*. (1) Then by s. 25 of the Companies Act, 1867, every share in any limited company shall be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless otherwise determined by

(1) (1867) L. R. 2 H. L. 325, 347.

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contract duly made and filed. This leaves the liability to pay the full nominal amount of each share absolutely untouched, and only prescribes the particular manner in which the shares are to be paid for where there is no registered contract. Here there is such a contract; but still the shares cannot be issued at a discount, and they must be paid for in money or in money's worth. It is established that when the shareholder pays in money he must pay the full nominal amount of his shares: *In re Addlestone Linoleum Co.* (1); *In re Almada and Tirito Co.* (2); *Lee* v. *Neuchatel Asphalte Co.* (3); *Ooregum Gold Mining Co. of India* v. *Roper.* (4) And the same principles apply when the shareholder is paying for his shares in property. Here the company were entitled to issue shares in payment to the vendors for property, but not to issue shares as fully paid up in exchange for property of less than the full nominal cash value of such shares. A limited company might, no doubt, make an improvident bargain which, in the absence of fraud and collusion, would hold good; but this was not the case of a bargain between an independent vendor and an independent company, and it cannot be said here that the consideration accepted can be regarded as representing the cash value of the shares, and as a fair equivalent for them: *In re Eddystone Marine Insurance Co.* (5); *Smith* v. *Brown* (6); *Elkington's Case.* (7)

It is not every contract that can be investigated; and a real cash bargain for property, though imprudent or excessive as to price, may stand; but here the parties themselves have demonstrated that they knew the shares were not to be paid for at their value in goods; there never was any cash debt constituted; and it was a legal impossibility for the company to issue the shares at less than their cash value: *In re Weymouth and Channel Islands Steam Packet Co.* (8); *Ex parte Welton.* (9)

The learned judge of the Court below has not taken a correct view of the facts. We do not seek to charge the vendors with dishonesty, nor do we seek to set aside the contract; but we

(1) (1887) 37 Ch. D. 191.
(2) 38 Ch. D. 415, 423.
(3) (1889) 41 Ch. D. 1, 16.
(4) [1892] A. C. 125, 134, 144.
(5) [1893] 3 Ch. 9, 19.
(6) [1896] A. C. 614.
(7) (1867) L. R. 2 Ch. 511.
(8) [1891] 1 Ch. 66.
(9) [1895] 1 Ch. 255.

claim to have established that the vendors have not paid in full for their shares, and that they must make good the deficiency whatever it may be.

Herbert Reed, Q.C., and *Ward Coldridge*, for the respondent Martin. The case made by the appellant is that there was no real independent bargain, and that the stock-in-trade was sold at an extravagant price. But Harrison, who was one of the contracting parties, was not a vendor; he was a debenture-holder and a shareholder, and as such perfectly competent to bargain on behalf of the company; while if the vendors were selling at an exorbitant price, they would have been more likely to take their profits in cash than in shares.

But all question as to the actual value of the property taken by the company is immaterial. No attempt has ever been made to set aside the contract. When a company has agreed to treat the property which it is to acquire and to pay for in shares as of a certain value, then, unless the contract can be rescinded on the ground of fraud (which is not alleged in this case), the agreement must be taken as it stands, and the sufficiency of the consideration given for the shares cannot be inquired into, the property must be taken as worth the agreed price, and the shares issued in respect of it must be taken to be fully paid up: *Pell's Case* (1); *Forbes and Judd's Case* (2); *In re Baglan Hall Colliery Co.* (3); *Salomon* v. *Salomon & Co.* (4) The decision in *Ooregum Gold Mining Co. of India* v. *Roper* (5) is not inconsistent with this; and that in *In re Almada and Tirito Co.* (6), though not in accordance with the authorities, does not shew that the value of property paid for in shares can be inquired into where the contract is not impeached; nor is there any case in which that has ever been held.

[Lindley L.J. referred to *Leeke's Case* (7) and *Chapman's Case*. (8)]

A contract, if it is one that cannot be rescinded, must be accepted as a binding contract, and as one that fixes the price,

(1) (1869) L. R. 8 Eq. 222; 5 Ch. 11.
(2) (1870) L. R. 5 Ch. 270.
(3) Ibid. 346.
(4) [1897] A. C. 22.
(5) [1892] A. C. 125, 134, 144.
(6) 38 Ch. D. 415.
(7) (1871) L. R. 11½ Eq. 100.
(8) [1895] 1 Ch. 771.

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where the subject of it is capable of a measure of value and there is an independent bargain. A vendor may say, "My property will fetch in the market only 15,000*l.*; but I will not sell it to you, the company, for less than 20,000*l.*" Why should not the company agree, if it chooses, to give 20,000*l.*? The contention is that you can inquire into the real value because otherwise the shares will not be paid up. But that is a fallacy. In the case of great banking or brewery firms that have been converted into limited companies it has been usual for the assets to be fixed at a price payable by the issue of shares. When property and not money is given in payment, it is necessary and sufficient that either one of two things shall be established, namely, either (1.) that the company has bonâ fide agreed to take the property at a price equal to the amount credited on the shares (in which case the value of the property is not material), or (2.) that the true value of the property was at the date of the issue of the shares not less than that nominal amount: Buckley on the Companies Acts, 7th ed. p. 607. In short, the price is fixed by the contract, and the number of shares is fixed against that price.

The argument for the appellant applies only to cases where there is no independent bargain. A man may have property which he values at 5000*l.* Why should he not sell it, if he chooses, for 10,000*l.*? This case can only be decided against us on the ground that the shares were issued at a discount, which has not been and cannot be proved. The evidence should be construed in favour of the transaction, and there is nothing in it to justify the inference that it was ultra vires. There is a broad principle that where a party is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on that party to prove the illegality: per Bowen L.J. in *Hire Purchase Furnishing Co.* v. *Richens.* (1)

Eve, Q.C., and *Carrington*, for the respondent Wragg. There is no evidence which shews that the company paid too much for the property it bought. As to the contention that the stock-in-trade is stated in the agreement to be worth 27,300*l.*

(1) (1887) 20 Q. B. D. 387, 389.

while in the books it is stated at 15,375*l.* only, the apportionment of the consideration is made by the agreement according to the usual practice, for the purpose of satisfying the requirements of the Stamp Act, 1891 (54 & 55 Vict. c. 39), while reducing the amount of ad valorem duty payable under s. 59, sub-s. 1; and the mode of apportionment does not affect the validity of the contract. There is nothing dishonest in attributing profit to stock; and if the parties had been acting dishonestly they would have taken good care to have rendered the arguments of the appellant impossible.

Sir R. B. Finlay, S.-G., in reply. No attempt has been made to support the grounds on which the judgment of Vaughan Williams J. proceeded, and I submit that they cannot be supported. It is said that the consideration for the purchase was apportioned as it was in the contract, because stamp duty is not payable upon stock-in-trade, and that the difference of 11,000*l.* odd ought to have been added to the 6000*l.* apportioned for the goodwill, raising that item to 17,000*l.*, and consequently that the apportionment was no real indication of value. That is equivalent to saying, "The goodwill was worth 17,000*l.*, but to escape stamp duty we put the goodwill, which was chargeable, at 6000*l.* only, and added 11,000*l.* to the goods and chattels which are free." But this would have been an evasion of the Stamp Act, 1891, and a gross fraud upon the revenue. In cases of this kind the apportionment must be made fairly bonâ fide, so that such property may bear its fair amount of stamp duty: The Stamp Act, 1891, ss. 5, 54, 58 sub-s. 1, 59; Alpe on Stamp Duties, 5th ed. pp. 20, 122; 1 Palmer's Company Precedents, 6th ed. p. 152; Dart's Vendors and Purchasers, 6th ed. pp. 597, 598; Davidson's Precedents, 3rd ed. vol. ii. pt. 1, p. 353; Key & Elphinstone's Conveyancing, 4th ed. vol. i. p. 369.

All the evidence upon the point, however, shews that the apportionment in clause 3 was correct, and displaces the contention that the goodwill was worth more than 6000*l.*

Another argument is that the excess in value represents a profit on the contract; but the vendors and the vendees are the same persons, the business is the same business; there is

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nothing more than a change in the manner in which it is held, and there can be no profit in the ordinary sense. But even if the vendors and vendees were independent, we shew that a sum has been added to the agreed price of the stock-in-trade, and no amount of bargaining would make a company to part with its shares for less than their nominal value. If the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate, according to Lord Watson in *Ooregum Gold Mining Co. of India* v. *Roper* (1), ought not to be critically examined; but here the company, according to their own shewing, did not do so. *Pell's Case* (2), *Forbes and Judd's Case* (3), and *In re Baglan Hall Colliery Co.* (4) do not touch the point here. It is not payment in kind if the thing taken is of insufficient value.

Cur. adv. vult.

March 19. Lindley L.J., after stating the facts of the case, continued:—The liquidator contends that the shares issued to Martin and Wragg were improperly issued as fully paid up, and cannot be properly so treated. No attempt has been made to impeach or set aside the agreement of January 10, 1894. Nor, having regard to the decision of the House of Lords in *Salomon* v. *Salomon & Co.* (5), is it possible to hold that agreement invalid on the materials before us. The company, although a small one, promoted by the vendors and managed by them, must be treated as competent to buy the property which it was formed to acquire, and to take it at the price named by the vendors. The only question is whether the shares issued as fully paid up in part payment of the price can be treated as fully paid up.

Before examining the law upon this point I will state the grounds on which the appellant contends that they cannot. It appears from the books of the company that the stock-in-trade, which by clause 3 of the agreement is taken to be worth 27,300*l.*, was entered as of the value of 15,375*l.* only, and it

(1) [1892] A. C. 125.
(2) L. R. 8 Eq. 222; 5 Ch. 11.
(3) L. R. 5 Ch. 270.
(4) Ibid. 346.
(5) [1897] A. C. 22.

is contended that the paid-up shares given to the vendors must be attributed in part at least to this difference of 11,000*l.* odd. In other words, it is contended that the company ought to be treated as having issued shares to the nominal amount of 20,000*l.* (the rest of the 27,300*l.* being cash or debentures) in payment of goods of much less value—namely, of the value of 15,000*l.* odd only—as both vendors and buyers well knew.

I am quite unable to take this view of the contract. I will assume that the stock-in-trade was worth only 15,000*l.*—i.e., that it would not have fetched more in the market. There was no agreement to buy the stock-in-trade at that price and to pay for it in shares of a larger nominal amount. The third clause in the agreement was merely inserted for stamp purposes. It was absolutely useless and meaningless for any other purpose. No evidence is required to prove it. No lawyer accustomed to the preparation of deeds can fail to see why it was inserted or its legal effect. Stamp duty had to be paid on so much of the 46,300*l.* as was liable to duty, and duty was payable in respect of so much of this sum as was attributable to the goodwill and of the freeholds and leaseholds, and of nothing else. These were valued at the respective sums mentioned in clause 3; 27,300*l.* remained and the stock-in-trade remained, and the 27,300*l.* was attributed to that. I do not say that this was right; but whether right or wrong, the third clause does not in any way alter the real agreement between the vendors and the company.

The real agreement was that the vendors should sell and that the company should buy the various properties mentioned in the schedule to the agreement for one sum of 46,300*l.*, which apparently was 11,000*l.* more than could have been obtained from any other purchaser. But the parties did not appropriate any part of the purchase-money to any definite part of the property purchased, nor is the Court at liberty to do so. It would be wholly wrong to treat the agreement as one to pay 27,300*l.* for stock-in-trade, valued as between the vendors and the company at 15,375*l.*, and to attribute the whole of the share capital to the purchase of that particular item. To do this is to fasten on the parties a contract which they never made and one,

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moreover, which would entirely defeat their intentions if the appellant is right in his contention.

Such being the true agreement between the parties, I will endeavour to ascertain the law applicable to the case.

In *Leifchild's Case* (1) a limited company bought a patent and paid for it in paid-up shares; the holder was held not to be a contributory. The agreement was not sought to be set aside, and no question as to the actual value of the patent was raised. No one apparently thought that question material. This case was decided in 1865 by Kindersley V.-C., and is valuable as shewing that as early as that year it was taken for granted that shares in a limited company issued as paid up in consideration of property transferred to the company must be treated as paid up unless the whole transaction was set aside on the ground of fraud.

In 1869 *Drummond's Case* (2) came before Giffard L.J., sitting as the Court of Appeal, and it was then distinctly decided that even a subscriber of the memorandum of association could satisfy his liability in respect of the shares for which he subscribed by paying for them in money or money's worth, or, as Giffard L.J. put it, in "meal or in malt." This general proposition has never been doubted; but there was a difficulty in applying it to a subscriber of the memorandum of association. The difficulty was to identify the shares which he was to receive as vendor with those which he had bound himself to take and pay for by subscribing the memorandum of association. This difficulty always arises in similar cases. It has never been doubted, so far as I know, that the obligation of every shareholder in a limited company to pay to the company the nominal amount of his shares could be satisfied by a transaction which amounted to accord and satisfaction or set-off as distinguished from payment in cash. In 1867 the Legislature rendered all such transactions invalid unless they were made pursuant to a duly registered contract; but if there is such a contract the law is now what it always was.

As regards the value of the property which a company can take from a shareholder in satisfaction of his liability to pay the

(1) (1865) L. R. 1 Eq. 231. (2) (1869) L. R. 4 Ch. 772.

amount of his shares, there has been some difference of opinion. But it was ultimately decided by the Court of Appeal that, unless the agreement pursuant to which shares were to be paid for in property or services could be impeached for fraud, the value of the property or services could not be inquired into. In other words, the value at which the company is content to accept the property must be treated as its value as between itself and the shareholder whose liability is discharged by its means.

The following are the decisions which established this doctrine. The point was first raised in 1869 in *Pell's Case*. (1) Pell had agreed to sell his business to a limited company for a certain number of fully paid-up shares which were allotted to him and were registered in his name. On the winding-up of the company, Lord Romilly held him to be a contributory in respect of these shares, but to be entitled to an inquiry as to the value of the property given for them, and to be allowed such value, but no more, towards payment of them. This decision, however, was reversed on appeal by Giffard L.J. (2), on the ground that, the agreement for the sale of the business for paid-up shares not being impeached, the shares ought to be treated as paid for in money's worth.

In *Forbes and Judd's Case* (3) Lord Hatherley clearly intimated his concurrence with the view that, unless the agreement was impeached, the value of the property given for the shares could not be gone into. In *In re Baglan Hall Colliery Co.* (4), Giffard L.J. again acted on the same principle, and there being, as he said, "some confusion in the views entertained of cases of this nature," he went fully into the grounds of his decision, referring to the various sections of the Companies Act, 1862, which were material. He fully recognised the obligation of a shareholder to pay for his shares; but he again held that this obligation could be satisfied otherwise than by payment in money. In that case the company had agreed to buy a colliery and to pay for it in shares, and the handing over of the colliery as the consideration for the shares was held to be payment in

(1) L. R. 8 Eq. 222.
(2) L. R. 5 Ch. 11.
(3) L. R. 5 Ch. 270.
(4) Ibid. 346.

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full. (1) No question was raised as to the value of the colliery. In *Leeke's Case* (2) Stuart V.-C. criticised *Pell's Case* (3), and evidently disapproved the decision of Giffard L.J.; but, although *Leeke's Case* (2) was affirmed on appeal, the Vice-Chancellor's strictures on *Pell's Case* (3) were not approved. (4)

In *Jones's Case* (5) the Court of Appeal again adhered to the principle laid down in *Pell's Case* (3), *Forbes and Judd's Case* (6), and *In re Baglan Hall Colliery Co.* (7) James L.J. seems to have had some doubt whether he should have come to the conclusion he did if it had not been for the decisions; but I understand his doubt was as to the identification of the shares subscribed for with those given for the property taken by the company. Mellish L.J. had no misgivings, and expressly approved the decision of Giffard L.J. in *Pell's Case*. (3)

In *Maynard's Case* (8) fully paid-up shares were allotted to a subscriber of the memorandum of association in payment of property sold by him to the company. He was held to have satisfied his liability, the company "being free to accept payment in any honest way." (9) It was proved to the satisfaction of the Court that the shares for which he subscribed were to be paid for in property to be bought by the company at a sum equal to the amount of the shares subscribed for. It was not suggested that the agreement was ultra vires or depended for its validity on the value of the property.

All these cases arose before the Companies Act, 1867, came into operation, although some of them were decided at a later date. In *Fothergill's Case* (10), which arose after that Act was in force, the above decisions were again considered, and were held inapplicable to cases to which that Act applied unless a proper agreement were duly registered. In *Fothergill's Case* (10) there was a registered agreement, but it was held not to apply to the shares for which he had subscribed the memorandum of association, and he was held to be a contributory in respect of

(1) L. R. 5 Ch. 357.
(2) L. R. 11 Eq. 100.
(3) L. R. 8 Eq. 222; 5 Ch. 11.
(4) (1871) L. R. 6 Ch. 469.
(5) (1870) L. R. 6 Ch. 48.
(6) L. R. 5 Ch. 270.
(7) Ibid. 346.
(8) (1873) L. R. 9 Ch. 60.
(9) L. R. 9 Ch. 65.
(10) (1873) L. R. 8 Ch. 270.

them. But I can find nothing to throw doubt on the application of the law as settled in *Pell's Case* (1), and the others referred to above, to similar cases arising since 1867, and in which the shares in question have been issued pursuant to a duly registered agreement as required by the Act.

In *Anderson's Case* (2) a colliery was sold to a limited company for paid-up shares. A proper agreement was registered. The price of the colliery to the company was 150,000*l.*, to be paid in shares. The vendors had shortly before agreed to buy it for 66,000*l.* and to pay 42,000*l.* in shares. They therefore made a huge profit. It was, nevertheless, held by the Court of Appeal that so long as the agreement for sale to the company was unimpeached, all the 150,000*l.* shares must be treated as fully paid up. This case is the last to which it is necessary to refer bearing directly on the question I am examining.

I understand the law to be as follows. The liability of a shareholder to pay the company the amount of his shares is a statutory liability, and is declared to be a specialty debt (Companies Act, 1862, s. 16), and a short form of action is given for its recovery (s. 70). But specialty debts, like other debts, can be discharged in more ways than one—e.g., by payment, set-off, accord and satisfaction, and release—and, subject to the qualifications introduced by the doctrine of ultra vires, or, in other words, the limited capacity of statutory corporations, any mode of discharging a specialty debt is as available to a shareholder as to any other specialty debtor. It is, however, obviously beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid-up shares for nothing and preclude itself from requiring payment of them in money or money's worth: *In re Eddystone Marine Insurance Co.* (3); nor can a company deprive itself of its right to future payment in cash by agreeing to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement for a statutory action for non-payment of calls: see *Pellatt's Case.* (4)

(1) L. R. 8 Eq. 222; 5 Ch. 11.
(2) (1877) 7 Ch. D. 75.
(3) [1893] 3 Ch. 9.
(4) (1867) L. R. 2 Ch. 527.

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From this it follows that shares in limited companies cannot be issued at a discount. By our law the payment by a debtor to his creditor of a less sum than is due does not discharge the debt; and this technical doctrine has also been invoked in aid of the law which prevents the shares of a limited company from being issued at a discount. But this technical doctrine, though often sufficient to decide a particular case, will not suffice as a basis for the wider rule or principle that a company cannot effectually release a shareholder from his statutory obligation to pay in money or money's worth the amount of his shares. That shares cannot be issued at a discount was finally settled in the case of the *Ooregum Gold Mining Co. of India* v. *Roper* (1), the judgments in which are strongly relied upon by the appellant in this case. It has, however, never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper, and pay for them in fully paid-up shares. Provided a limited company does so honestly and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, it appears to be settled by *Pell's Case* (2) and the others to which I have referred, of which *Anderson's Case* (3) is the most striking, that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the companies and their creditors. The Legislature in 1867 appears to me to have distinctly recognised such to be the law, but to have required in order to make such agreements binding that they shall be registered before the shares are issued.

There is certainly no decision yet which is opposed to the above statement of the law. The observations in *In re Addlestone Linoleum Co.* (4), *In re Almada and Tirito Co.* (5), *Lee* v. *Neuchatel Asphalte Co.* (6), and *Ooregum Gold Mining Co. of India* v. *Roper* (1), relied upon by the appellant in this case, fall far short of deciding that the value of the property or services paid for in shares can be inquired into or is material in any

(1) [1892] A. C. 125.
(2) L. R. 8 Eq. 222; 5 Ch. 11.
(3) 7 Ch. D. 75.
(4) 37 Ch. D. 191.
(5) 38 Ch. D. 415.
(6) 41 Ch. D. 1.

case in which the sale is not impeached. These and other cases decided upon the Act of 1867 shew (1.) that since that Act, as before, shares must be paid for in money or money's worth; (2.) that since that Act, as before, they may be paid for in money's worth; (3.) that since the Act payment in money's worth can only be effectually made pursuant to a properly registered contract; (4.) that, even if there is such a contract, shares cannot be issued at a discount; (5.) that if a company owes a person 100*l.*, the company cannot by paying him 200*l.* in shares of that nominal amount discharge him, even by a registered contract, from his obligation as a shareholder to pay up the other 100*l.* in respect of those shares. That would be issuing shares at a discount. The difference between such a transaction and paying for property or services in shares at a price put upon them by a vendor and agreed to by the company may not always be very apparent in practice. But the two transactions are essentially different, and whilst the one is ultra vires the other is intra vires. It is not law that persons cannot sell property to a limited company for fully paid-up shares and make a profit by the transaction. We must not allow ourselves to be misled by talking of value. The value paid to the company is measured by the price at which the company agrees to buy what it thinks it worth its while to acquire. Whilst the transaction is unimpeached, this is the only value to be considered.

This appears to me to be in complete accordance with the passages quoted from the judgments of Cotton L.J. in *In re Almada and Tirito Co.* (1) and Lords Watson and Macnaghten in *Ooregum Gold Mining Co. of India* v. *Roper.* (2) Lord Herschell's judgment, as I understand it, is distinctly favourable to the respondents. In my judgment the law is settled, and cannot be declared wrongly settled by this Court, at any rate. If it is to be altered, the decisions which have settled it must be declared wrong by the House of Lords, or the law must be altered by Act of Parliament. Vaughan Williams J. has had to consider this matter on more than one occasion—namely, in

(1) 38 Ch. D. 423. (2) [1892] A. C. 136-7, 147-8.

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Chapman's Case (1), and again in the present case—and on both occasions the principle on which he based his decision is in my judgment correct. The summons which has raised the question of Martin and Wragg's liability is of an unusual kind, being a misfeasance summons and an alternative application to enforce payment up of the shares. It was dismissed with costs, and no question was raised on appeal except the important question of principle which I have considered. The appeal must be dismissed with costs.

A. L. SMITH L.J., after stating the facts of the case up to the agreement by Wragg and Martin for the sale of their business to the company, continued:—

The Solicitor-General, who appeared for the liquidator, did not seek upon any ground to impeach the sale by Messrs. Wragg & Martin to E. J. Wragg, Limited; but he asserted that he could shew by evidence that the shares in E. J. Wragg, Limited, which were taken by Wragg and Martin as fully paid up in part payment of the agreed price of 46,300*l.*, were not so—in other words, that he could shew that there was a deficiency in the value of the property sold by Messrs. Wragg & Martin to the company for the agreed price of 46,300*l.*, and that as regards that deficiency, which he alleged to be 11,647*l.*, the shares held by them were not fully paid up.

It is admitted that the present proceeding of the liquidator is without precedent, and apart from the authorities, some of which I will deal with hereafter.

I will first ascertain the facts upon which the liquidator relies in proof of his case, assuming that he is entitled to go into them. [His Lordship then stated the agreement of January 10, 1894, and continued:—]

It is argued for the liquidator that the 3rd clause of the agreement of January 10, 1894, shews that the stock-in-trade sold to the company was valued at 27,300*l.*

I agree that upon the face of this clause it is so; but before I say that it is proved that 27,300*l.* was the value of the stock-in-trade, I must consider for what purpose this apportionment

(1) [1895] 1 Ch. 771.

of the 46,300*l.* into its different component parts was made and inserted in the agreement. The Solicitor-General was unable to make any suggestion as to this. He simply said there it is stated upon the face of the clause that the value of the stock-in-trade was 27,300*l.*, and that establishes the fact. Primâ facie this would be so; but as except upon one hypothesis the clause is obviously useless and there is no possible reason for its insertion, I do not think that what would otherwise be its primâ facie meaning is necessarily its real meaning. The hypothesis is this: that the distribution of the items in this clause was made solely to arrive at the stamp duty payable upon the instrument of agreement, for otherwise it is inconceivable why it should have been inserted; and that this is the only reason for its existence I have no doubt.

It was said that the Court could not come to such a conclusion without having the respondents' evidence thereon.

But with evidence, or without evidence, for what other purpose was the clause inserted? To this there has been no answer. In my judgment this supposed valuation of the stock at 27,300*l.* is not a real valuation of such stock at all. [The Lord Justice then referred to the certificate signed by Martin and Wragg as to the value of the stock-in-trade on January 1, 1894, and the book of the company containing the entries headed "Purchase of Business," and continued:—]

What is the meaning of this last entry, "Balance to Goodwill Account, £11,647"? Does it mean profit upon the sale of Messrs. Wragg & Martin's business to the company, over and above the estimated items therein appearing; or, if not, what does it mean? The liquidator suggests that it was put in as representing nothing. The accountant he called to give evidence as to this gave no intelligible account of why he made this entry as he did. He said that he found that there was a sum of 11,647*l.* to be accounted for, and so he entered it in this way: the liquidator ignores the fact of a possible profit being made upon the sale of the business to the company, and says that he has proved that the sum of 11,647*l.* represents nothing. I do not think that he has.

It was vigorously insisted upon that, as the respondents had

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not been called, the Court was bound not to infer that the component parts of the 46,300*l.* were allocated as they were in clause 3 for stamp duty purposes, for that would be to infer that it was done for the purpose of defrauding the revenue, which no court could without evidence infer. Assuming for a moment the probability that the agreed price of 46,300*l.* for the business as a going concern embraced a profit to Mr. Wragg and Mr. Martin upon the sale thereof to the company over and above the estimated items, the whole thing is at once explained.

Whether the Revenue can complain is another matter; and, indeed, it would seem that the 11,647*l.* should have been distributed over the different items sold, and not placed exclusively upon the stock, and if this were the point I should decide against Messrs. Wragg & Martin.

In my judgment, the liquidator fails to establish that the 11,647*l.* is a fictitious entry and represents nothing; and, indeed, the true inference from the facts adduced by the liquidator is that it represents the agreed profit passing to the vendors upon the sale of this business to the company. The liquidator has failed to prove that the 27,300*l.* was the real price of the stock, and thereby, as he contends, the 11,647*l.* represents nothing. But, even if this were otherwise, another point arises. If there were in fact the shortage, as it has been called, of the 11,647*l.*, what right has the liquidator to say that the shortage was the consideration for the shares, so that by that amount they were not fully paid up?

There was ample property conveyed by the vendors to the company to satisfy 1993 fully paid-up shares of 10*l.* each, i.e., 19,930*l.*; for, leaving out the 10,000*l.* of mortgages transferred to the company, the agreed price was 36,300*l.* Deduct 11,647*l.*, the alleged shortage, and it leaves 24,653*l.* as consideration for 19,930*l.* of shares.

Why is the liquidator to allocate the shares against what he alleges to be shortage, even if it existed, and not against the whole consideration of 24,653*l.*?

Mr. Buckley ingeniously argued that if he did not do this the result would follow that the consideration for the 7000*l.* cash

and for the 9300*l.* of first and second debentures would be short—that is, assuming that there was no agreed profit upon the transaction. He got at it thus: 36,300*l.* agreed contract price (leaving out the two mortgages for 10,000*l.*), 11,647*l.*; shortage leaves 24,653*l.*; shares, 1993, leaving 4723*l.* as consideration for the 7000*l.* cash and the 9300*l.* in first and second debentures; and therefore, he said, the shares, and not the cash and debentures, must be taken to have had insufficient consideration given for them. A purely speculative conclusion, and which also omits the consideration of profit.

So much for the facts; and upon these alone, apart from the cases, I agree with my brother Vaughan Williams that the liquidator has failed in his case.

But when I come to the authorities the same result follows.

It is now well settled law that for a shareholder in a company limited by shares to have fully paid-up shares, and therefore not to be liable for calls in a winding-up of the company, he must shew that he has fully paid up to the face value of the shares, either in cash or in value received by the company in some form; or partly in cash and partly in value received by the company in some form; and if the payment other than in cash be relied on, this can only be so if there be a "contract duly made" in writing, and filed with the Registrar of Joint Stock Companies, at or before the issue of the shares, pursuant to s. 25 of the Companies Act, 1867. The House of Lords has definitely settled this point in the case of the *Ooregum Gold Mining Co. of India* v. *Roper*. (1)

Partial payment is not sufficient; but shares may be lawfully issued as fully paid up for considerations which the company have agreed to accept as representing in money's worth the nominal value of the shares: per Lord Watson in the *Ooregum Case*. (2)

It is not suggested that the contract of January 10, 1894, is not an honest bargain, or that its consideration is colourable or illusory.

Now, is a liquidator entitled to go into the adequacy of the consideration, and to shew, if he can, that the consideration for

(1) [1892] A. C. 125. (2) [1892] A. C. 136.

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the contract was inadequate, unless it appears so upon the transaction itself; or, if not, if he desires to do so, must he not impeach the contract itself?

If there be no consideration at all for the shares, and it be shewn, as in the case of *In re Eddystone Marine Insurance Co.* (1), that the words inserted in the registered contract, "in consideration of services," were placed there as a mere blind, that will suffice.

Again, if in a registered contract a money value less than the face value of the share be placed upon the consideration which the company had agreed to accept as representing in money's worth the nominal value of the share, that share, I should think, would not be fully paid up; for instance, as was put in argument, a contract to supply to a limited company 100 tons of coal, valued at 10*s.* per ton, as a consideration for 100 1*l.* shares in the company—i.e., a value of 50*l.* worth of coal for 100 1*l.* shares—these shares would not be, I think, fully paid up.

There would be no necessity in such a case for impeaching the agreement, for that the shares were not fully paid up in money or money's worth would be apparent upon its face. Cotton L.J. in *In re Almada and Tirito Co.* (2) points to such a case as this, though he did not decide it.

If, however, the consideration which the company has agreed to accept as representing in money's worth the nominal value of the shares be a consideration not clearly colourable nor illusory, then, in my judgment, the adequacy of the consideration cannot be impeached by a liquidator unless the contract can also be impeached; and I take it to be the law that it is not open to a liquidator, unless he is able to impeach the agreement, to go into the adequacy of the consideration to shew that the company have agreed to give an excessive value for what they have purchased. I will content myself with citing three of the earlier cases, and I will begin with *Pell's Case.* (3) Pell in this case had agreed to sell to a company the goodwill and stock-in-trade of his business in consideration of 1500 20*l.* shares of the

(1) [1893] 3 Ch. 9. (2) 38 Ch. D. 421.
(3) L. R. 5 Ch. 11.

company fully paid up. The company was wound up, and no payment for these shares could be found in the books of the company. Lord Romilly M.R. directed an inquiry as to the value handed over by Pell to the company under his agreement with them, and declared that Pell was entitled to be allowed only the amount of that value. This decision was reversed upon appeal, Sir G. M. Giffard L.J. holding that as the agreement was not impeached the Court had no ground for going behind the agreement.

In the next year (1870), in *Forbes and Judd's Case* (1), Hatherley L.C. deals with *Pell's Case* (2), and expressly states that if the consideration is to be impeached the contract must also be impeached. He says: "The only difference between Giffard L.J. and the Master of the Rolls in *Pell's Case* (2) was this. The Master of the Rolls thought that Pell, being bound to pay the full amount of 20*l.* per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy Pell's business, and Giffard L.J. thought that the contract not being impeached, must be treated as a good contract, and one that ought to be acted upon so, that no question could be raised as to the actual value of the business made over."

The Lord Chancellor clearly approves, and in no way disapproves, of the decision of Giffard L.J. in *Pell's Case.* (2)

In *In re Baglan Hall Colliery Co.* (3) Giffard L.J. again lays down what he had stated in *Pell's Case.* (2)

It is true that in *Leeke's Case* (4) Stuart V.-C. did not like the decisions in Pell's and Forbes' cases by Lord Hatherley and Giffard L.J.; but many cases have been decided since then all in accord with *Pell's Case* (2), which Lindley L.J. has referred to, and I do not repeat them, and not a single case has been cited to the contrary.

It appears to me that in the House of Lords, in the *Ooregum Case* (5), the principle of *Pell's Case* (2) and *Forbes and Judd's*

(1) L. R. 5 Ch. 273.
(2) Ibid. 11.
(3) L. R. 5 Ch. 346.
(4) L. R. 11 Eq. 107.
(5) [1892] A. C. 125.

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Case (1) was distinctly approved. Lord Watson (2) says: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has lawfully agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice."

Lord Herschell (3) is very distinct upon this point. He says: "But the contrary has been determined. And not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the Courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the share"; and Lord Macnaghten (4) says: "It seems to me that all that has been determined so far is that the Court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price."

In my judgment, whether the facts of this case are looked at,

(1) L. R. 5 Ch. 270.
(2) [1892] A. C. 136.
(3) [1892] A. C. 140.
(4) Ibid. 148.

or whether the laws applicable thereto are looked at, the liquidator is in the wrong, and my brother Williams was quite right in dismissing this application.

RIGBY L.J. In this case the respondents Wragg and Martin were two of the first three directors of the company now in course of being wound up, the third, Harrison, having been also made a respondent to the summons, though not interested in the appeal.

Wragg and Martin had for a considerable time before the incorporation of the company carried on the business of omnibus and cab proprietors at Whitechapel and elsewhere in London.

What their respective interests as between themselves were in the assets of the business we cannot infer from the evidence, nor is it necessary that we should know.

Wragg and Martin were minded to turn their business, as the phrase goes, into a private limited company—that is to say, a limited company in which the vendors were to take, at any rate in the first instance, practically all the shares in the company, which were to be allotted, as part of the consideration for the purchase of the goodwill and assets of the partnership, to the vendors or their nominees, including, as I understand, the subscribers of the memorandum of association.

The property to be sold to the new company consisted of freehold estate of sufficient value to have been accepted as security for a first mortgage debt of 8000*l.* with interest at 6 per cent., and a second mortgage debt of 2000*l.* with interest at 5 per cent. These mortgages were apparently treated by the mortgagees as fair security. There were leaseholds of small value, a considerable stock-in-trade consisting, among other things, of omnibuses, cabs, and horses, worth at any rate not less, according to the evidence, than 15,000*l.*

The business was therefore a very substantial one. The assets (notably the goodwill of the business) could not from the nature of them be said to have any market value; and what they would be worth to a company incorporated to carry on the business would depend upon considerations as to which

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there would be room for considerable honest difference of opinion.

The vendors were of course able to settle the constitution of the company according to their own wishes, and they determined that it should be brought out with a capital of 20,000*l.* in 2000 shares of 10*l.* each, and that there should be an issue of first debentures for 10,000*l.*

Neither the amount of capital nor the amount proposed to be raised on first debentures can be said to have been on the face of the matter extravagantly large, regard being had to the nature of the business to be transferred.

The only effect, beyond the appearance of greater importance to be given to the company, of putting down 20,000*l.*, instead of, say, 10,000*l.*, as the capital of the company, would be to make the value of each share proportionately smaller. The vendors or their nominees might be able to dispose of their shares on better terms if the capital were larger; but it is only fair to observe that the vendors in fact retained by far the largest part of the share capital until the winding up of the company.

The vendors determined to fix the price for the property to be sold at 46,300*l.* How this sum was arrived at we do not know. No doubt it included a large amount of what would be profit to the vendors if they disposed of their shares favourably, but so long as they continued to hold them this would be nominal profit only.

The vendors did not require to be paid a large amount in cash, and arranged that the 46,300*l.* should be paid as follows: 10,000*l.* by the company taking over the existing mortgages on the freeholds; 7000*l.* in cash (which was expected to be raised by means of first debentures for that amount); 3000*l.*, the residue of the first debentures; 20,000*l.* in shares to be treated as fully paid up.

This left 6300*l.* to be raised somehow or other, and I think Mr. Eve's suggestion a probable one, that the balance so remaining determines the amount, 6300*l.*, of the second debentures.

This arrangement was carried out by an agreement dated

January 10, 1894 (the company having been incorporated just before).

The memorandum of association provided for the execution of this agreement. The agreement was executed by the authority of the board of directors consisting of Wragg and Martin and one Harrison, and its execution by the company was attested by Wragg and Harrison.

A supplementary agreement was executed the same day, whereby the solicitor of the company undertook to raise 7000*l.* by first debentures, of which 4600*l.* was to be paid to Martin, 1000*l.* to the credit of the company, and out of the residue Wragg and Martin covenanted to pay the debts of the partnership.

The last terms of this agreement were plainly insisted upon for the satisfaction of debenture-holders, and were very fair.

So far nothing could be more straightforward or more reasonable, subject always to the question whether the intended ultimate profit to be realized was not fixed too high.

As, however, it is not suggested that there is ground for setting aside the contract, I do not see, subject to the point which I reserve as to appropriation of the purchase-money, how, consistently at any rate with *Anderson's Case*, (1) the shares could possibly be treated as not fully paid up. In the present as in *Anderson's Case* (1), the shares allotted were allotted to vendors, or persons representing vendors, and in *Anderson's Case* (1) the 150,000*l.* worth of shares allotted consisted, to an extent of far more than 50 per cent., of profit reserved to the members of the syndicate selling.

That case is undoubtedly binding upon us. It was cited and relied upon in the *Ooregum Case* (2), and was not, I think, in any way disapproved of. Certainly there is nothing in the opinions of the noble and learned Lords to shake the authority of the case.

By saying that *Anderson's Case* (1) is an authority binding us, I do not mean to intimate an opinion that there are not other authorities to the same effect.

I think that the series of authorities cited by Lindley L.J.,

(1) 7 Ch. D. 75. (2) [1892] A. C. 125.

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beginning with *Pell's Case* (1), have made it impossible in such a case as above indicated to inquire effectually into the value of the property taken in exchange for shares where the contract itself is not impeached. If these authorities are to be overruled that must be done by the House of Lords. But it is said that a clause in the main agreement of January 10, 1894, namely, clause 3, makes the present case an exception to the general rule.

Before examining that clause I will consider what the actual agreement between the parties was independently of that clause. Clearly it was a purchase of the whole freehold property dealt with at an entire price.

Neither the vendors nor the purchasers would have sold or bought any one of the items independently of the others.

It is not in accordance with the facts that there were a number of independent purchases of separate items, and no one could say that, independently of the clause, it would have been possible to make any appropriation of portions of the purchase-money.

As the vendors would have the full control over the consideration given, and could divide it in accordance with their rights inter se, there could be no object connected with any difference in those rights in making any appropriation. In addition to this, it is manifest that the figures in the clause are not founded on any exact estimate of the rights of the different partners, the figures being throughout round numbers which could hardly by possibility conform to pre-existing rights.

It is obvious that it could not in any way make the slightest difference to the company, except for the stamp duty payable, that part of the consideration should be given for one part of the assets rather than for another.

My conclusion is that the clause was intended to be operative only as regards stamp duty. The apportionment may have been a wrong apportionment, but that cannot alter the nature of the contract or entitle the company to deal exceptionally with it.

I am not prepared to say that in no cases can the considera-

(1) L. R. 8 Eq. 222; 5 Ch. 11.

tion in kind given for paid-up shares be inquired into, even although there may be nothing on the face of the contract to shew the insufficiency of the consideration; but I abstain from attempting to define what the cases are. I think it sufficient to say that in my judgment the opinions of the noble and learned Lords in the *Ooregum Case* (1) sufficiently indicate that such cases may arise.

They must be dealt with when they do arise.

LINDLEY L.J. The appeal must be dismissed with costs in the usual way.

Solicitors for applicant in the Court below, *Young & Co.*; on appeal, *Walter Murton, Solicitor to the Board of Trade.*

Solicitors for respondent Martin: *Colyer & Colyer.*

Solicitor for respondent Wragg: *A. E. Greville.*

W. W. K.

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[1896 H. 326.]

National School—Trustees—Statutory Conveyance—Local Authority—Making up Street—Recovery of Expenses—"Owners"—"Charge"—Enforcing Charge—Sale—School Sites Act, 1841 (4 & 5 *Vict. c.* 38), *ss.* 6, 10—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.

Under s. 6 of the School Sites Act, 1841, a piece of land was conveyed, in the form given in s. 10, to trustees for ever for the purposes of the Act, as a site for a national school, "and for no other purpose whatever"; and a national school was afterwards erected upon it. The local authority, under s. 150 of the Public Health Act, 1875, made up a street on part of which the school premises abutted, and served the trustees with notice under that Act to pay the apportioned expenses:—

Held (affirming Kekewich J.), that the trustees were liable for those expenses as "owners" within the Public Health Act, 1875, and that therefore the expenses were, until recovery thereof, a "charge" upon the premises under s. 257: but (reversing Kekewich J.) that the local

(1) [1892] A. C. 125.

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authority could not enforce the charge by an order for sale of the school premises, since such an order would be in contravention of the School Sites Act, 1841.

Bowditch v. *Wakefield Local Board*, (1871) L. R. 6 Q. B. 567, followed.

IN this case, as already reported (1), Kekewich J. had held that the defendants, the trustees of a national school erected on a site conveyed to them under s. 6 of the School Sites Act, 1841 (4 & 5 Vict. c. 38), were "owners" of the school premises within the Public Health Act, 1875 (38 & 39 Vict. c. 55); and his Lordship accordingly made an order declaring that, under s. 257 of that Act, the apportioned expenses, amounting to 111*l.* 15*s.* 11*d.*, incurred by the plaintiffs, the local authority, in making up a new street on part of which the school premises abutted, were a charge upon those premises, together with interest at 4 per cent. per annum and the plaintiffs' taxed costs of their application: leave being given to the plaintiffs to apply at chambers as to the mode of enforcing the charge.

The plaintiffs then took out a summons asking that, for the purpose of enforcing that order, the school site and premises might be sold free from the trusts created by the indenture of April 28, 1847 (mentioned in the former report), or otherwise as the judge might direct, and subject to conditions of sale to be settled in chambers.

The summons came on for hearing before Kekewich J. on January 13, 1897.

Macmorran, Q.C., and *E. Beaumont*, for the plaintiffs. The Court having already held that the defendants, the trustees of the school, are "owners" within the Public Health Act, 1875 (2), and that therefore the plaintiffs are entitled to a

(1) [1896] 2 Ch. 254.

(2) The following are the enactments of the Public Health Act, 1875 material to the present case:—

Sect. 4: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say" (inter alia)

"'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

By s. 150 an urban authority are

charge under s. 257 of that Act, the question now arises how that charge is to be enforced, in view of the fact that under the conveyance in pursuance of the School Sites Act, 1841, the defendants hold the property for the purposes of the school "and for no other purpose whatever." The principle upon which the Act of 1875 proceeds in imposing the charge is that the premises themselves are improved in value by the making up of the street. In accordance with that principle, in the case of an ordinary private trust, the charge is imposed on the trust property, and there can be no reason why it should not be similarly imposed in the case of property subject to a public trust. It is settled by the decision of Jessel M.R. in *Corporation of Birmingham* v. *Baker* (1) that the charge under s. 257 is a charge on the total ownership of the premises, that is, on the

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empowered, by notice addressed to the respective owners or occupiers of the premises abutting on such parts of a street as require to be sewered, &c., to require them to sewer, &c., the same; and if such notice is not complied with the urban authority are empowered themselves to execute the works mentioned or referred to in the notice, and to recover in a summary manner the expenses incurred by them in so doing from the owners in default according to the frontage of their respective premises and in such proportion as is settled by the surveyor of the urban authority.

Sect. 251: "All offences under this Act, and all penalties forfeitures costs and expenses under this Act directed to be recovered in a summary manner, or the recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction. . . ."

Sect. 252: "Any complaint or information made or laid in pursuance of this Act shall be made or laid within six months from the time when the matter of such complaint or information respectively arose. . . ."

[This section was repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4; but a similar provision is made by s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), commonly known as Jervis' Act.]

Sect. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. . . ."

(1) (1881) 17 Ch. D. 782.

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respective interests of every owner for the time being in proportion to the value of his interest. It is immaterial whether the property is held upon any trusts, private or public. Equitable as well as legal interests, present or future, are alike bound by the charge, which overrides them all.

[KEKEWICH J. referred to *In re Christchurch Inclosure Act* (1) and *Guardians of Tendring Union* v. *Dowton*. (2)]

The *Christchurch Case* (1), so far as it touches the present case, is in our favour. In the *Tendring Case* (2) it was held by the Court of Appeal that a person who was entitled to the benefit of a restrictive covenant over land, being a person having adverse rights against the owners of the land, could not be bound by a charge under s. 257; but in other respects the decision of Jessel M.R. was distinctly upheld. In the present case the Court is not asked to interfere with the rights of any stranger or outside person.

It is said that the absence from s. 6 of the School Sites Act, 1841 (3), of a reverter clause providing for the event of the land

(1) [1894] 3 Ch. 209.

(2) [1891] 3 Ch. 265.

(3) The following sections of the School Sites Act, 1841 (4 & 5 Vict. c. 38), were referred to:

Sect. 2: "Any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland being the proprietor in fee simple or under entail, and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange, or in fee simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge; provided that no such grant made by any person seised only for life of and in any such manor or lands shall be valid, unless the person next entitled to the same in remainder, in fee simple or fee tail (if legally competent), shall be a party to and join in such grant: Provided also, that where any portion of waste or commonable land shall be gratuitously conveyed by any lord or lady of a manor for any such purposes as aforesaid, the rights and interest of all persons in the said land shall be barred and divested by such conveyance: Provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding."

Sect. 3 contains similar provisions

ceasing to be used for the purposes of a school—whereas such a clause occurs in s. 2 as to limited owners and in the sections dealing with lands in Cornwall and Lancashire—is a strong circumstance to shew that this land is devoted for ever to the purposes of a school, and therefore cannot be sold. But the absence of a reverter clause is not material, because under the general law there is a resulting use for the grantor except so far as the property is taken out of him for the purposes of the conveyance.

[KEKEWICH J. Can you explain why under the Act there should be reverter in other cases and not in this?]

We cannot. This land was originally glebe land, and after the conveyance it must be treated as having remained glebe land, except so far as it was required for the purposes of this school. In *Bowditch* v. *Wakefield Local Board* (1) Lush J. remarked (2), that while churches and chapels were expressly exempted by the Local Government Act, 1858 (21 & 22 Vict. c. 98), from the charge, schools were not expressly exempted, which led to the inference that it was not intended that they should be exempt. In the case of *Scottish Widows' Fund* v. *Craig* (3) it was held that a charge on glebe land under a statute which contained remedial provisions could be enforced in the ordinary way by sale. It is inconceivable that the Legislature

with regard to lands belonging to the Duchy of Lancaster, with a similar clause of reverter.

Sect. 4 contains similar provisions with regard to lands belonging to the Duchy of Cornwall, with a similar clause of reverter.

Sect. 5 empowers persons under disability to convey.

By s. 6, "It shall be lawful for any corporation, ecclesiastical or lay, whether sole or aggregate, and for any officers, justices of the peace, trustees, or commissioners, holding land for public, ecclesiastical, parochial, charitable, or other purposes or objects, subject to the provisions next hereinafter mentioned, to grant, convey, or enfranchise, for the purposes of this Act, such quantity of land as aforesaid in any manner vested in such corporation, officers, justices, trustees, or commissioners: Provided always, that no ecclesiastical corporation sole, being below the dignity of a bishop, shall be authorized to make such grant without the consent in writing of the bishop of the diocese to whose jurisdiction the said ecclesiastical corporation is subject. . . ."

Sect. 10 prescribes the form of a grant under the provisions of the Act.

(1) L. R. 6 Q. B. 567.

(2) Ibid. 569.

(3) (1882) 20 Ch. D. 208.

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could have intended to confer a charge which was incapable of enforcement. For these reasons it is submitted that the charge in this case ought to be enforced by sale or mortgage of the school premises free from the trusts of the deed of April 28, 1847.

Dibdin, for the defendants, the school trustees. I submit that this land has in effect been rendered unsaleable by statute. The reason why no reverter clause is contained in s. 6 is because it is primarily designed to enable the incumbent of a benefice to devote glebe land, as was done in this case, to school purposes, and it would have been wrong to place it in his power, after having invited and received subscriptions, to reacquire the land by giving up the school. Under that section, therefore, there is no reverter clause as in other sections, and particularly s. 2 relating to limited owners. It would be unjust that a limited owner should be allowed to give land for the purposes of a school, and that, on the purposes failing, the Attorney-General should be enabled to step in and have the gift applied cy-près. But in the case of conveyances under s. 6 it was intended that the land should be used for ever for the education of the poor, and that that general purpose should, if necessary, be carried out cy-près. The trusts of the deed under s. 10 are incorporated into the Act of 1841 so as to have statutory effect, and consequently this land is placed entirely extra commercium, because it must for ever be used as a school, "and for no other purpose whatever." *Guardians of Tendring Union* v. *Dowton* (1), so far as it is applicable, is an authority in our favour. There the person entitled to the benefit of the restrictive covenant was held not to be bound by the charge, because, though he had a right enforceable in respect of the land, he was in no sense an owner. So, in the present case, the inhabitants of the parish for whose benefit the school was intended, although they have rights in respect of the school which it would be the duty of the Attorney-General to enforce, are in no sense "owners," and their rights, according to the *Tendring Case* (1), cannot be bound by the charge. The case of *Scottish Widows' Fund* v. *Craig* (2) has no application. There

(1) [1891] 3 Ch. 265. (2) 20 Ch. D. 208.

the land was not placed outside commerce at all, and the only disability was the personal one of the incumbent under 13 Eliz. c. 10, which was removed by the statute there in question, so far as the persons entitled to the charge were concerned. The Court is really invited to hold that the express and specific provision in the School Sites Act, 1841, as to the user of the land, is repealed by the general enactment in the Public Health Act, 1875. It is at least doubtful on the authorities (see *Wright* v. *Ingle* (1) and *Bowditch* v. *Wakefield Local Board* (2)) whether these school managers are "owners" within the meaning of the Act of 1875; but, apart from all authority, I submit that this land is stamped with a charitable trust which cannot be got rid of by Act of Parliament, and the Court has therefore no jurisdiction to order a sale or mortgage of the land free from the trusts of the deed.

No reply was called for.

KEKEWICH J. In my opinion the applicants are entitled to have the sum due to them, and which has been declared to be a charge on this land, raised by a sale or mortgage. That the ordinary rights of persons having a charge extend to the case where the charge is effected or declared by or under an Act of Parliament—even though the Act of Parliament may be peculiar in its nature and contain remedial provisions which would not be available at common law—is established, I think, by the case of *Scottish Widows' Fund* v. *Craig* (3), which otherwise seems to me to have nothing to do with the case in hand. The difficulty in this case arises from the particular statute, and from the form of conveyance which is prescribed by the statute. The statute is the School Sites Act, 1841 (4 & 5 Vict. c. 38), and the conveyance is made under s. 6 of that Act, and is more or less in the form prescribed by s. 10, which says that the land is to be applied as a site for a school and "for no other purpose whatever." If the land ceases to be used or applied for that particular purpose, then the trustees to whom it is conveyed must apparently either lose the land or must hold it subject to

(1) (1885) 16 Q. B. D. 379. (2) L. R. 6 Q. B. 567.
(3) 20 Ch. D. 208.

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some action, if a right exists in any one against them, for a breach of duty. If they continue to hold the land subject to an action against them, then they are the owners. If, on the other hand, the land can be recovered in an action against them as on breach of duty or by any other process, then it belongs to some one else. It is remarkable, no doubt, that the particular section has not provided for the contingency I have mentioned, as some of the other sections do, and I was disposed to attribute some importance to that. It certainly was as well to consider, seeing that there was no provision in the particular section, what would happen if the contingency occurred. But I do not think it necessary to enter upon a learned discussion how the land would be dealt with, in whom rights would vest, and how those rights could be enforced if the contingency occurred. Mr. Dibdin suggests as a possible result that, this being a charitable trust, there would have to be an application cy-près at the instance of the Attorney-General. In such a proceeding the Attorney-General does not represent the Crown, as owner, and therefore I have not to consider how far the Crown would be bound as the ultimate owner by the statute. He only represents the Crown as parens patriæ, and therefore the property would not pass to the Crown, but to those persons who, under the peculiar jurisdiction of the Court, were held entitled to it in a scheme settled cy-près. When that event occurs, either the trustees continue to be owners, because there is no one to replace them, or they will be replaced by some one having a title under the authority of the Court. The owners, therefore, are the trustees or their successors so long as the land is used for a school, and for no other purpose whatever, and then some other persons, at present unascertained, will succeed to the ownership. The question is whether, having regard to that state of things, the district council are entitled to have this money raised by sale or mortgage. The Public Health Act, 1875, by s. 257, after providing for the recovery of expenses incurred by a local authority, for the repayment whereof the owner of the premises for or in respect of which they are incurred is made liable by the Act, says that "until recovery of such expenses and interest, the same shall be a charge on the

premises in respect of which they were incurred." The meaning of those words came before Sir George Jessel in the case of *Corporation of Birmingham* v. *Baker* (1), and he held that by charge on "the premises" was implied a charge on all the successive ownerships, whether estates for life or in fee or otherwise. The words in which he expressed his judgment are (2): "The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the house; and consequently there is no good reason in the world why there should not be a charge on the property, that is, on the respective interest of every owner of the property according to the value of his ownership." According to that decision this money must be raised by sale or mortgage in the way in which any other charge would be raised out of the property.

But then it is said that the Court of Appeal differed from that decision in the case of *Guardians of Tendring Union* v. *Dowton* (3), where their Lordships considered the *Birmingham Case* (1) not to be applicable. There the difficulty arose in this way. The owners were necessarily bound according to the decision of the Master of the Rolls; but there was a third person, an outside person, a person who was in no sense an "owner" of the premises—namely, an adjoining owner who had taken a covenant of a restrictive kind as to the use of the premises for certain purposes, and the question was not whether the owners would be bound according to the decision of the Master of the Rolls, but whether a charge on the premises, and therefore on all the owners in succession, could be enforced against an outside person, a stranger, who was entitled to the benefit of this covenant. Lord Halsbury L.C., who presided in the Court of Appeal, admitted the full meaning of the charge on the premises, and he says (4): "It is clear that the person against whom the judgment is to stand is the owner. Indeed, the whole machinery of the Act shews that the owners and occupiers are the persons against whom the proceedings are to be taken"; and then he comments on the judgment of

(1) 17 Ch. D. 782.
(2) Ibid. 785.
(3) [1891] 3 Ch. 265.
(4) Ibid. 267.

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the Master of the Rolls in order to shew that the case before him was limited to owners, and did not apply to an outside person or stranger. I pass over that judgment and that of Lindley L.J., to the same effect, because it seems to me that I have the exact thing which I am looking for in a more concise and clear form in the judgment of Fry L.J. He says: "All the Act does is to create a charge on the premises"; and then he goes on by a series of equations to shew what that means, "that is, on the land—that is, on all the interests of the owners of the land." That is in substance exactly what the Master of the Rolls said in *Corporation of Birmingham* v. *Baker* (1), only in different words. Then Fry L.J. adds: "But here we have to deal with the rights of a person against the owners of the land," that is to say, the rights of the stranger entitled to the benefit of the restrictive covenant. In the case before me there is no stranger, no outside person. As I have already said, either the trustees are the owners themselves, or they, together with persons at present unknown and unascertained, who will succeed them, are the owners. With them at any rate they make up the owners. I have therefore a charge on the premises, that is, on the land—that is, on the interests of the persons who may become entitled quite as much as of the persons who are actually entitled. On that ground it seems to me that I shall be following both the decisions in *Guardians of Tendring Union* v. *Dowton* (2) and *Corporation of Birmingham* v. *Baker* (1), and the general law as contained in *Scottish Widows' Fund* v. *Craig* (3), in deciding, as I now do, that this money must be raised by sale of the premises, free from incumbrances and the trusts of the deed of April 28, 1847, in the ordinary way under the direction of the judge in chambers: and I make an order accordingly.

C. C. M. D.

C. A. The defendants appealed from that order, and also, by leave, from the original order.

The appeal was heard on March 17 and 18, 1897.

(1) 17 Ch. D. 782. (2) [1891] 3 Ch. 265.
(3) 20 Ch. D. 208.

Dibdin, for the defendants. The trustees are not "owners" of the school within the meaning of ss. 4 and 257 of the Public Health Act, 1875. They have no power to let the school at a rack-rent; it cannot be let at all. The deed of trust of the school is in the form given in s. 10 of the School Sites Act, 1841 (4 & 5 Vict. c. 38); and the land was conveyed to the trustees under s. 6 of the Act which, unlike ss. 2, 3, and 4, contains no "reverter" clause; so that, in such a case, the land, when once it has been conveyed to the trustees, cannot, except under the authority of a statute, be used for any other purpose than the site of a school. As a general rule, no doubt, when property is given to specified charitable purposes and those purposes fail, the property reverts to the donor: *In re Randell* (1); *Christ's Hospital* v. *Grainger* (2); *Walsh* v. *Secretary of State for India* (3); *In re Bowen*. (4) Here the fact that there is a reverter clause in some of the sections of the Act of 1841, while there is no such clause in s. 6, shews that the Legislature intended under that section to impress an indelible character upon the land. It has been held that, as a general rule, the charge created by s. 257 of the Public Health Act, 1875, is a charge on the premises—on the total ownership, not on the interest of any particular owner: *Corporation of Birmingham* v. *Baker*. (5) But an exception to this general rule was established in *Guardians of Tendring Union* v. *Dowton* (6), in which case land was subject to a restrictive covenant limiting its user, and it was held that a local authority in selling the land to enforce a charge under s. 257 could not obtain an order for the sale of the land free from the covenant. Here, the land being held by the trustees for a purpose which excludes the existence of any power to let it, there is no "owner" liable to pay expenses under s. 150, and therefore there can be no charge upon the land and no power to sell it to enforce a charge. In *Wright* v. *Ingle* (7), a case under the Metropolis Management Acts, 1855 and 1862, Bowen L.J. said (8):

(1) (1888) 38 Ch. D. 213.
(2) (1848) 1 Mac. & G. 460.
(3) (1863) 10 H. L. C. 367.
(4) [1893] 2 Ch. 491.
(5) 17 Ch. D. 782.
(6) [1891] 3 Ch. 265.
(7) 16 Q. B. D. 379.
(8) Ibid. 402.

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"Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an 'owner' within the meaning of s. 250, I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of s. 250."

And that expression of opinion is borne out by *Angell* v. *Vestry of Paddington* (1), *Plumstead Board of Works* v. *British Land Company* (2)—see the remarks of Blackburn J. at the first hearing of that case (3)—and *Great Eastern Ry. Co.* v. *Hackney District Board of Works.* (4) All these were cases under the Metropolis Management Acts but they establish in my favour this proposition, that a person holding property which has been placed "extra commercium," or made subject in perpetuity to the burden of a public right or trust which deprives him of its beneficial use, is not an "owner" of land abutting on a street, so as to be liable for the expenses of making up the street. Other cases which at first sight appear to be against me are really in my favour. In *Bowditch* v. *Wakefield Local Board* (5), where it was held that the trustee of a school built on a site conveyed under the School Sites Act, 1841, was an "owner" within the Public Health Act, 1848, the conveyance of the site was made under s. 2 of the School Sites Act, 1841, which contains a reverter clause, whereas s. 6, under which the conveyance in the present case was made, contains no such clause. That case was decided before *Wright* v. *Ingle.* (6) So in *Vestry of St. Mary, Islington* v. *Cobbett* (7), which followed *Bowditch's Case* (5), the assignment of the land there in question contained a clause equivalent to a reverter clause, and that was the ground of the decision. (8) *In re Christchurch Inclosure Act* (9) was also a case decided upon the authority of *Bowditch's Case.* (5)

But even if the defendants are held to be "owners," my

(1) (1868) L. R. 3 Q. B. 714.
(2) (1875) L. R. 10 Q. B. 203, 206, 209.
(3) (1874) L. R. 10 Q. B. 23.
(4) (1883) 8 App. Cas. 687, 693, 698, 701–2.
(5) L. R. 6 Q. B. 567.
(6) 16 Q. B. D. 379.
(7) [1895] 1 Q. B. 369.
(8) Ibid. 373.
(9) [1894] 3 Ch. 209.

contention is that the order for sale made by the learned judge below must be wrong, because here is a statutory fetter against selling this property in the market. Sect. 14 of the School Sites Act, 1841, gives a power of sale, but only for a limited purpose. This order for sale is nugatory and useless, because the school premises must be used in one particular way and no other, and without profit. That being so, the plaintiffs have no remedy. It is like the case of a man taking a mortgage of an advowson and contracting himself out of a sale. The defendants have no available school funds beyond the usual grant from the Board of Education, and no fees—only subscriptions and donations out of which poor-rates are paid. Accordingly I submit, first, that there is no charge at all; and, secondly, that if there is, it is a barren charge, because there is a statutory fetter on the property which prevents that charge being enforced by sale.

Macmorran, Q.C., and *E. Beaumont*, for the plaintiffs. The power of the defendants, the trustees, to deal with this property is not regulated solely by the School Sites Act, 1841, for under s. 23 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the trusts may be altered by a transfer of the school to the school board, in which case the managers would be able to let it at a rent under s. 22, and the school board could pay any charge upon it; for it seems that a national school is within the Act: *In re Burnham National Schools.* (1) The school premises would then be placed in the same position as if there had been a reverter clause in s. 6 of the Act of 1841, or in the conveyance under it. The trustees therefore being under no incapacity to let, the case comes precisely within *Bowditch's Case.* (2) The observations quoted from the judgment of Bowen L.J. in *Wright* v. *Ingle* (3) apply only to the incapacity stamped on the premises, as in the case of a church. With regard to the absence of an express reverter clause in s. 6, there must, in certain events, such as the bankruptcy of the trustees or the school becoming useless, say through being surrounded by houses, or being taken by a railway company, or ceasing to

(1) (1873) L. R. 17 Eq. 241, 246. (2) L. R. 6 Q. B. 567.
(3) 16 Q. B. D. 379, 402.

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be used for any purpose, be a reverter in law, otherwise the trustees would remain the legal owners.

In *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (1) *Bowditch's Case* (2) was not cited, and moreover the property in respect of which the charge was sought to be made was not in itself capable of being let, being the parapets of a bridge, so that there was "an incapacity to be let stamped on the premises."

[*Dibdin* referred to *Williams* v. *Wandsworth Board of Works*. (3)]

There it was held that the expenses fell on a strip of land four inches wide and 265 feet in length because it could be let at a rack-rent. Again, in *Plumstead Board of Works* v. *British Land Co.* (4), there was "incapacity stamped on the premises," that case being distinguished from *Lord Northbrook* v. *Plumstead Board of Works*. (5) We rely on the principle laid down in *Bowditch's Case* (2), which, although commented on somewhat adversely by Bowen L.J. in *Wright* v. *Ingle* (6), was not actually overruled.

[RIGBY L.J. I should like to hear how you support the *Bowditch Case*. (2)]

The cases cited in support of the defendants' contention in the present case come to this: that where land is by common law or by statute incapable of being let at a rack-rent, there is no person who is "owner" within the interpretation clause, s. 4, of the Public Health Act, 1875. Now this property is not in point of fact incapable of being let at a rack-rent. To escape the Act the incapacity must be on the property itself, not on the trustees. Under s. 4, "owner" means the person receiving the rack-rent of the lands or premises, "or who would so receive the same if such lands or premises were let at a rack-rent." That is clear from Bowen L.J.'s judgment in *Wright* v. *Ingle*. (7) *Bowditch's Case* (2) is approved of in *Lord Northbrook* v. *Plumstead Board of Works* (8), and is

(1) 8 App. Cas. 687.
(2) L. R. 6 Q. B. 567.
(3) (1884) 13 Q. B. D. 211.
(4) L. R. 10 Q. B. 203.
(5) (1871) L. R. 7 Q. B. 183.
(6) 16 Q. B. D. 379.
(7) Ibid. 400.
(8) L. R. 7 Q. B. 183, 195.

cited and not dissented from in *Caiger* v. *Vestry of St. Mary, Islington.* (1) Then if we have a charge under the statute, we have a charge upon the whole interest in the premises: *Corporation of Birmingham* v. *Baker* (2); *Guardians of Tendring Union* v. *Dowton* (3); and we can sell the land and the house on it without being subject to any kind of restriction. Against that there is the decision in *Guardians of Tendring Union* v. *Dowton* (3); but there is no reason why the trust here should create any restriction: there is no difference in principle between an ordinary trust and a statutory trust. If this were an ordinary trust the property might, if necessary, be sold and conveyed discharged from it. So if the trustees were to part with it, either under s. 14 of the School Sites Act, 1841, or under s. 23 of the Elementary Education Act, 1870, the trust would go.

The Public Health Act, 1875, imposes the liability for expenses upon all premises without exception, subject only to the exemption in s. 151 of any church, chapel, or place appropriated to public religious worship, the word "premises" having the widest possible interpretation given to it by s. 4; and no other exemption ought to be read into the Act. The Legislature must have been aware of the existence of disabilities under such Acts as that of 1841, and therefore, in specially exempting from the operation of the Act of 1875 premises of a certain kind, must be held to have intended the charge under the Act to apply to all other premises, and that this charge should be enforceable notwithstanding any disability under the Act of 1841. The Act having said, in s. 257, that these expenses shall be a "charge" upon the premises, the plaintiffs, as the owners of that charge, are entitled to claim the assistance of the Court in raising it: *Scottish Widows' Fund* v. *Craig.* (4)

Dibdin, in reply. I am not claiming an exemption under the Public Health Act, 1875, but upon the construction of the Act I submit that the trustees of this school are not "owners." Churches and chapels are expressly exempted because they

(1) (1881) 50 L. J. (M.C.) 59.
(2) 17 Ch. D. 782.
(3) [1891] 3 Ch. 265.
(4) 20 Ch. D. 208, 214.

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are properties from which the owners would derive pew rents, and the exemption will be strictly construed, as in *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* (1), where a cemetery company was held to be an "owner" within the interpretation clause in the Metropolis Management Act, 1855, corresponding to that in the Act of 1875, although their land was consecrated land. My contention is that the decision in *Bowditch's Case* (2) is wrong, and there is no recorded instance of its ever having been acted upon in the case, at all events, of a national school.

In *Scottish Widows' Fund* v. *Craig* (3) there was no statutory fetter against selling the glebe as there is here.

As to the Elementary Education Act, 1870, it is very doubtful whether s. 23 contemplates such a case as this. If it does, then, under sub-s. 1, the school must be carried on under existing trusts.

The *Tendring Case* (4) shews that if this property is sold it must be sold subject to the fetter, and that fetter renders it unmarketable.

Cur. adv. vult.

April 3. The judgment of the Court (Lindley, A. L. Smith and Rigby L.JJ.) was delivered by

A. L. SMITH L.J. By indenture dated April 28, 1847, the rector of Hornsey, pursuant to the provisions contained in s. 6 of the School Sites Act, 1841 (4 & 5 Vict. c. 38), conveyed to the Archdeacon of Middlesex a piece of the glebe land belonging to the rectory to hold unto the use of the archdeacon and the rector of Hornsey and their respective successors for ever, to be applied as a site for a school for poor persons of the parish and for no other purpose whatever, such school to be always in union with the Incorporated National Society for Promoting the Education of the Poor; and it was provided that the management, direction, control, and government of the school and premises should be vested in and exercised by a committee consisting of the rector for the time being and of

(1) [1894] 1 Q. B. 699.
(2) L. R. 6 Q. B. 567.
(3) 20 Ch. D. 208, 214.
(4) [1891] 3 Ch. 265.

five other persons. The piece of land so conveyed was bounded by and abutted upon a high road upon its eastern side, which road of late having become a new street, the urban district council of Hornsey, under the powers conferred upon them by s. 150 of the Public Health Act, 1875, have executed paving and other works thereon; and the district council now seek, under s. 257 of the Act, to recover the expenses they have so incurred by means of a charge upon the school premises and an order for sale of these premises to satisfy such charge. There is in this case no question as to the school premises not being bounded by and abutting upon the new street, nor whether the appellants were trustees of the school when the works were executed.

The first question is whether the appellants are "owners" of the land within the meaning of the Public Health Act, 1875, in which case a charge by virtue of s. 257 of the Act would be created upon the premises; and the second is, if there be such a charge, whether the Court can enforce it by ordering a sale of the school premises.

As regards the first point, this depends upon whether the appellants are "owners" of the school premises within the meaning of s. 257 of the Act of 1875. This section enacts, "Where any local authority have incurred expenses for the repayment whereof the owner of the premises . . . . is made liable under this Act . . . . such expenses may be recovered . . . . from any person who is the owner of such premises when the works are completed, ... and until recovery of such expenses . . . . the same shall be a charge on the premises in respect of which they were incurred."

By s. 4 of the same Act, "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." In the case of *Bowditch* v. *Wakefield Local Board* (1), in the year 1871, the Court of Queen's Bench held that the trustees to whom premises had been conveyed for the

(1) L. R. 6 Q. B. 567, 570.

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purposes of a school under the provisions of s. 2 of the School Sites Act, 1841, were "owners" within the meaning of s. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which is identical so far as "owner" is concerned with s. 4 of the Public Health Act, 1875; and if this case is good law and has not been overruled, there can be no doubt that the appellants are "owners" within the meaning of s. 257 of the Public Health Act, 1875. Blackburn J. in delivering his judgment in this case said: "The definition of 'owner,' however, in s. 2 does not say 'owner' shall include, but shall mean. Now, though these premises are and must be held as schools, and cannot be let for any purpose, yet, if they were let, the rent would come to the appellant. I think, therefore, he is 'owner' within the meaning of the definition. There is no apparent reason why a trustee of these schools should not be within the Act; and as to the difficulty of the appellant getting recouped, those who undertake trusts do often incur liability, and must have recourse to such measures as are open to them." Mellor and Lush JJ. based their judgments upon the ground that as there was no special exemption in the statutes as regards schools as there was with regard to churches, schools were liable to the expenses.

It cannot be said that *Bowditch's Case* (1) has ever been in terms overruled, nor do we find that it has ever been doubted; but, on the contrary, as will be seen hereafter, it was treated as good law as lately as in the year 1885 by this Court in the case of *Wright* v. *Ingle* (2), and by Stirling J. in *In re Christchurch Inclosure Act* (3), and by Mathew J. in 1894, in the case of *Vestry of St. Mary, Islington* v. *Cobbett.* (4)

It is, however, argued on behalf of the appellants, the trustees of the school, that two cases—the one in the Exchequer Chamber, *Plumstead Board of Works* v. *British Land Co.* (5), and the other in the House of Lords, *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (6)—shew that the ground of Blackburn J.'s decision in *Bowditch's Case* (1) was erro-

(1) L. R. 6 Q. B. 567.
(2) 16 Q. B. D. 379.
(3) [1894] 3 Ch. 209.
(4) [1895] 1 Q. B. 373.
(5) L. R. 10 Q. B. 203.
(6) 8 App. Cas. 687.

neous, and consequently the case is no longer law. It was said that the ground of his decision was that "owner" in the Act included, amongst others, the case of the owner of premises which were never capable of being let at a rack-rent, and that the two cases above mentioned shewed that this was not so. Blackburn J., in the same year in which he decided *Bowditch's Case* (1), in the case of *Lord Northbrook* v. *Plumstead Board of Works* (2), and again in 1874 in *Plumstead Board of Works* v. *British Land Co.* (3), reaffirmed what he had said in *Bowditch's Case* (1); but this later case was taken upon appeal to the Exchequer Chamber and reversed, and it is said that this reversal overruled *Bowditch's Case* (1), and that the House of Lords, in the year 1883, in *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (4), had done the same thing. The appellants' point is this—that it is not now correct to say that a person is an "owner" within the meaning of s. 257 of the Public Health Act, 1875, if the property which he possesses is by law for ever incapable of being let at a rack-rent. They point out that in the year 1868, prior to *Bowditch's Case* (1), Blackburn J., in the case of *Angell* v. *Vestry of Paddington* (5), had stated that he could not see how commissioners for building additional churches could be said to be owners within s. 250 of the Metropolis Management Act, 1855, which section, as regards "owner," is identical with s. 4 of the Public Health Act of 1875.

In the case of *Plumstead Board of Works* v. *British Land Co.* (6) in the Exchequer Chamber, it was held that, assuming the Land Company to be owners of the soil of the roads, they were not "owners" thereof within s. 250 of 18 & 19 Vict. c. 120 (the Metropolis Management Act, 1855), because the roads had been irrevocably dedicated to the public; in other words, because the roads had for ever become incapable of being let at a rack-rent, and, therefore, the Land Company were not "owners" within the meaning of the section. We must point out that that judgment, which was delivered by Lord Coleridge,

(1) L. R. 6 Q. B. 567.
(2) L. R. 7 Q. B. 195.
(3) L. R. 10 Q. B. 16.
(4) 8 App. Cas. 687.
(5) L. R. 3 Q. B. 718.
(6) L. R. 10 Q. B. 203.

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in which Bramwell, Cleasby, Pollock, and Amphlett BB., and Grove J. concurred, leaves out of consideration that the minerals under the roads were still the property of the defendants; but that case is nevertheless an authority binding upon us, that if the land of an owner be irrevocably dedicated to the public he is not an "owner" within the meaning of the Act. *Bowditch's Case* (1) was not cited in the Exchequer Chamber.

Again, in the House of Lords in 1883, in the case of *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (2), the same thing was held. One point which arose in that case was whether the Great Eastern Railway Company were "owners" of land within the meaning of the Act. Lord Watson sums up the previous authorities, though *Bowditch's Case* (1) was again not referred to, and says (3): "The authorities cited in the course of the argument appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed 'extra commercium' or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862" (the Metropolis Management Act, 1862) ". . . . . These fences are mere accessories of the public highway, and are not in my opinion land capable of yielding a rack-rent to the appellants within the meaning of the statutes." Lord Blackburn agreed in this opinion. These two cases, in our judgment, shew that, if land be by statute for ever incapable of yielding a rack-rent, the owner thereof is not "owner" within the meaning of the Acts.

In the year 1885, in *Wright* v. *Ingle* (4), this Court had to consider the meaning of the word "owner" in the 250th section of the Metropolis Management Act of 1855, which, as before stated, is identical with s. 4 of the Act of 1875. The Court by no means overruled *Bowditch's Case* (1); but, on the contrary, Lord Esher expressly says that he thought he was not overruling any previous case and that *Bowditch's Case* (1) remained untouched. He says (5): "If by statute a

(1) L. R. 6 Q. B. 567.
(2) 8 App. Cas. 687.
(3) 8 App. Cas. 693, 697.
(4) 16 Q. B. D. 379.
(5) 16 Q. B. D. 392.

house, or a building . . . . is put into such a category that it never can, so long as that statute lasts, be let at all at a rack-rent, there never can be the 'owner' described in the 250th section." Bowen L.J. says (1): "But s. 250 does not confine the term 'owner' to those persons who could receive a rack-rent from the particular premises, or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at such a rent, and I think *Bowditch* v. *Wakefield Local Board* (2) is a conclusive authority, if authority were wanted, to shew that a man is not the less the 'owner' of premises, because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent. Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an 'owner' within the meaning of s. 250, I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of s. 250."

As before stated, Stirling J., in *In re Christchurch Inclosure Act* (3), treated the case of *Bowditch* v. *Wakefield Local Board* (2) as still standing, and in 1894, in the case of *Vestry of St. Mary, Islington* v. *Cobbett* (4), Mathew J. treated it as a binding authority. (5) It is true that there is no provision for reverter in s. 6 of the Act of 1841, under which the land was conveyed to the predecessors of the appellants, as there is in the prior sections—why this was omitted we do not know—but it will be seen that under s. 14 of the Act of 1841 the present school premises and buildings may in certain events be sold or exchanged by the trustees for other land or building suitable to the purposes of their trust, in which case the school premises would become unfettered from the obligation "of being applied for the site for a school for poor persons of the parish and for no other purpose whatever"; and it would also seem that under s. 23 of the Elementary Education Act, 1870

(1) 16 Q. B. D. 402.
(2) L. R. 6 Q. B. 567.
(3) [1894] 3 Ch. 209.
(4) [1895] 1 Q. B. 369.
(5) [1895] 1 Q. B. 373.

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(33 & 34 Vict. c. 75), the school might be transferred to a school board either at a nominal rent or otherwise. In these circumstances, in our judgment, it cannot be said, as is said by the appellants, that the school premises are by statute incapacitated for ever from earning a rack-rent, and consequently the first point taken by the school trustees fails. It may be that the reason given by Lord Blackburn in *Bowditch's Case* (1) has been dissented from, but that does not necessarily make the decision itself wrong, for if in *Bowditch's Case* (1), as in the present, the premises were not subject "in perpetuity to a public right," the decision is correct. In our judgment *Bowditch's Case* (1) as a decision stands, and consequently the district council have a charge upon the premises of the appellants.

We now come to the question whether this charge can be enforced by this Court making an order for the sale of the school premises. It appears to us clear that the School Sites Act, 1841, never contemplated such a proceeding, for it enacts by the statutory form of conveyance that "the premises were to be conveyed for the purposes of the said Act and to be applied as a site for a school for poor persons of the parish . . . . and for no other purpose whatever." As long as the premises remain a site for the school and are used as such, the Court, by ordering a sale, would be obviously acting in direct contravention of the special legislation of 1841, and, indeed, when the Act of 1841 was passed there was not, as far as we know, any means by which a third party could obtain a charge upon the property, and a fortiori he could obtain no order for its sale. It is true by the general Act of 1875 (the Public Health Act of that year) in certain cases a local authority may get a charge upon premises for expenses incurred by them, but we can find nothing in the general Act to shew that it was intended by the Legislature to override the manifest object of the special Act of 1841, which an order for the sale of the school premises would clearly frustrate. It may be said, Why give a charge if it is not to be enforced by an order for sale; but where in the general Act of 1875 can be found any indica-

(1) L. R. 6 Q. B. 567.

tion of the Legislature that school sites when used for school purposes should be sold to pay paving expenses? It is familiar law that special Acts are not repealed by general Acts unless there is some express reference to the previous legislation upon the subject, or unless there is a necessary inconsistency in the two Acts standing together. The cases of *London and Blackwall Ry. Co.* v. *Limehouse District Board of Works* (1), *Thorpe* v. *Adams* (2), and *Fitzgerald* v. *Champneys* (3) are good examples of this.

For these reasons we are of opinion that Kekewich J. was right when he held that the district council held a charge upon the school premises, but was not right in ordering a sale of them. The district council have a remedy against the trustees personally under the Act of 1875, but the time in this case has been allowed to elapse for the exercise of this remedy. As regards the charge which they have upon the school premises, the district council are not, in our judgment, entitled to ask the Court for an order for the sale of them in the circumstances at present existing. The charge will stand, but the order for sale must be set aside, with costs here and below.

Solicitors: *Leonard J. Tatham; Lee, Bolton & Lee.*

(1) (1856) 3 K. & J. 123, 127–8. (2) (1871) L. R. 6 C. P. 125, 135.
(3) (1861) 2 J. & H. 31, 54–5.

G. I. F. C.

NORTH J.
1897
March 27.

In re TOLEMAN.
WESTWOOD *v.* BOOKER.

[1897 T. 312.]

Practice—Will—Action touching Validity—Appointment of Administrator pendente lite—Right of Creditor to Sue Administrator—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 70.

An administrator pendente lite of the personal estate of a deceased person, appointed by the Probate Division, under s. 70 of the Court of Probate Act of 1857, pending an action touching the validity of the will of the deceased, may, without any leave of the Court, be sued in the Chancery Division by a creditor of the deceased in the same way as a general administrator.

MOTION by the defendant, asking that all proceedings in the action might be stayed, with costs to be paid by the plaintiff as between solicitor and client.

James Toleman died on October 9, 1896. He had executed a will, but when the present action was commenced probate had not been granted, an action—*Martin* v. *Toleman*—having been commenced in the Probate Division with reference to the validity of the will. In that action an order was, on the application of the plaintiffs, on December 14, 1896, made by the President that such person as should be agreed upon between the parties, or, in default of agreement, as should be nominated by one of the registrars, should be appointed the administrator pending that action of the personal estate of James Toleman, and that, on an appearance being entered for the heir-at-law, the same person should be also appointed to be the receiver pending the action of the rents and profits of the real estate of the deceased. By an order of the President dated December 21, 1896, Eustace Booker was appointed administrator and receiver pending suit.

On February 24, 1897, the originating summons in the present action was served on Booker. The plaintiff Charles John Westwood sued on behalf of himself and all other creditors of Toleman. The summons described the defendant Booker as "administrator of the estate" of Toleman, and

asked—(1.) That an account might be taken of the dealings between the plaintiff and James Toleman with reference to the construction, financing, and working of the South Eastern Metropolitan Tramways Company. (2.) That, so far as necessary, the real and personal estate of Toleman might be administered under the direction of the Court, and that payment might be made of what should be found due to the plaintiff. (3.) The appointment of a receiver. (4.) That an account might be taken of what was due to the estate of Toleman upon a mortgage by the plaintiff and another person to Toleman of shares and debentures of the South Eastern Metropolitan Tramways Company, and that the mortgage might be redeemed, the plaintiff being willing and offering to redeem the same. (5.) That a sale might be ordered of the property comprised in the mortgage.

The plaintiff's affidavit in support of the summons stated that the defendant had been appointed by the Probate Division administrator of the estate.

The defendant entered an appearance under protest to the summons, and on March 6 the plaintiff took out a summons to set aside the appearance as irregular. This summons stood over by consent.

On March 22, upon a motion by Booker, (as administrator pendente lite and receiver, in the action *Martin* v. *Toleman*), the President made an order "that the administrator pendente lite and receiver be at liberty to defend the action *In re Toleman, Westwood* v. *Booker,* in the Chancery Division, and to apply for a stay therein, or to take such other steps as he may be advised, and under the present circumstances the Court (without deciding whether or not leave is required) refuses to give leave to C. J. Westwood to commence or continue proceedings in the Chancery Division against the administrator pendente lite and receiver. And the Court refuses to restrain the said C. J. Westwood from suing the administrator pendente lite and receiver in the action *In re Toleman, Westwood* v. *Booker,* and the Court gives leave to the administrator pendente lite and receiver to appeal from such refusal to restrain the said C. J. Westwood."

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The President held that he had no jurisdiction to restrain Westwood from suing the administrator pendente lite in the Chancery Division.

The grounds assigned by the defendant for the present motion were: (1.) "That this action has been brought against the defendant solely in his capacity as administrator pendente lite appointed by the Probate, Admiralty and Divorce Division in the exercise of its probate jurisdiction, and pending proof of the will of James Toleman, and after notice to the plaintiff of the defendant's position, and without leave and in contempt of the Probate Division."

(2.) "That in any case this action is frivolous and vexatious as against the defendant, who has no interest in the estate of James Toleman, and no rights in relation thereto, except as such officer as aforesaid."

Ashton Cross and *Priestley*, for the defendant. The administrator pendente lite is an officer of the Probate Division, and it is a contempt to sue him without the leave of the Court which appointed him. (1) In *Dowdeswell* v. *Dowdeswell* (2) it was held that an action to establish the title of the plaintiff as sole next-of-kin of an intestate could not be maintained against an administrator ad litem, but that a general administrator of the estate was a necessary party. In *Ellice* v. *Goodson* (3) the

(1) By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 70, "Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction."

Sect. 71: "It shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid or any other person to be receiver of the real estate of any deceased person pending any suit in the court touching the validity of any will of such deceased person by which his real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct."

(2) (1878) 9 Ch. D. 294.

(3) (1845) 2 Coll. 4, 9.

form of an order appointing an administrator for the purposes of a suit in Chancery is given. It differs from the form of appointment of an administrator pendente lite in the Probate Division.

[NORTH J. In that case the administrator was not a general administrator; here he is general administrator pendente lite: *Tichborne* v. *Tichborne*. (1)]

In *Searle* v. *Choat* (2) it was held that a receiver appointed by the Court cannot be sued without the leave of the Court. An administrator pendente lite appointed by the Probate Division stands in the same position as a receiver appointed by the Chancery Division. He is to act "under the direction" of the Probate Division. How can he so act, if he is liable to be called to account by a creditor in another court? Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 5.

Swinfen Eady, Q.C., and *J. M. Stone*, for the plaintiff, were not called upon.

NORTH J. In my opinion this application must fail. An administrator pendente lite of the personal estate of this testator has been appointed by the Probate Division, under s. 70 of the Court of Probate Act of 1857, the exact state of things mentioned in that section having arisen. The section provides that an administrator so appointed "shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate." It is argued that the words which follow—"every such administrator shall be subject to the immediate control of the Court, and act under its direction"—place the administrator in the position of a receiver appointed by the Court, and that, therefore, he cannot be sued without the leave of the Court. I cannot see any correspondence between the two positions. Sect. 71 of the Act enables the Probate Court to appoint a receiver of the real estate of any deceased person pending any suit in the court touching the validity of any will of that person by which his real estate may be affected.

In the Chancery Division a receiver may be appointed either

(1) (1869) L. R. 1 P. & M. 730, 733. (2) (1884) 25 Ch. D. 723, 726.

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of real estate or of personal estate, but in the Probate Division the Act does not contemplate the appointment of a receiver of the personal estate; it contemplates something much larger. It contemplates the appointment of an administrator, the appointment which is always made with respect to the personal estate of an intestate. But, inasmuch as there is a dispute pending whether or how far the alleged will of the testator is valid, the administrator is appointed only during the pendency of that litigation. The suggestion that, after that litigation is at an end, a creditor, or any claimant against the estate who had commenced an action against the administrator pendente lite, would have to start de novo against the person found to be executor or against a general administrator, seems to me an entire mistake. If proceedings are commenced against the administrator pendente lite, they will be continued against the executor or against the full administrator when he is appointed, and the duties of the administrator pendente lite have come to an end. The Court has appointed an administrator pendente lite of the personal estate, and he has all the rights and powers of a general administrator, except that of distributing the residue of the personal estate. I am of opinion that he can be sued. The final words of s. 70 seem to me to make no difference. Such an administrator stands in a somewhat peculiar position, and he can apply to the Court for directions and can act under its direction. But to say that he is not therefore in the position of a general administrator seems to me going beyond what the Act says. I think the administrator pendente lite can be sued. It would be monstrous if he could not, because, while the parties are fighting as to who shall have the control of the estate, the Statute of Limitations would be running and the creditors might be left out in the cold. In *Tichborne* v. *Tichborne* (1) the person who had been appointed administrator pendente lite by the Probate Court was sued in the Court of Chancery by a creditor for the administration of the estate, and a decree for administration was made. The necessity for the appointment of some person against whom proceedings can be taken by a creditor, while litigation

(1) (1870) L. R. 2 P. & M. 41.

as to the right to administer the estate is pending, is well illustrated by that case. I am not at present prepared to say that on the hearing of this summons I should give the relief for which the plaintiff asks. It may well be that the Court might think it right to give relief against the administrator pendente lite, or, on the other hand, it might think it better to order the summons to stand over until a complete administrator had been appointed. That is a matter of discretion to be dealt with hereafter: but I can see no reason why the proceedings on this summons should now be stayed.

I refuse the motion with costs.

Solicitors: *H. Pumfrey; Baillie & Cato.*

W. L. C.

STIRLING J. *In re* NIXON'S NAVIGATION COMPANY.

1897
March 20.

Company—Reduction of Capital—Capital "in excess of the wants of the Company"—Return to Shareholders—Issue of Debentures—Companies Acts, 1867 *and* 1877.

The Court, upon the requirements of the Companies Act, 1867, ss. 13, 14 being satisfied, confirmed a scheme of reduction under which a portion of the capital of a company was to be returned to the shareholders, although a part of the portion so returned was to be immediately borrowed from them by the company on debentures.

THIS was a petition by the above-named company asking for the confirmation by the Court of special resolutions passed by the company for the reduction of its capital under a scheme whereby a portion of the capital (in excess of the wants of the company) was to be returned to the shareholders and immediately borrowed upon debentures.

The company was incorporated in 1882 under the Companies Acts, 1862 to 1880, as a company limited by shares, with a capital of 780,000*l.* in 7800 shares of 100*l.* each. The whole of these shares were subscribed by the seven signatories of the memorandum of association. They had all been issued, and were credited as paid up to the extent of 87*l.* 16*s.* per share, leaving 12*l.* 4*s.* uncalled. Of the said sum of 87*l.* 16*s.*, 6*l.* 16*s.* per share only had been paid up in cash, and 81*l.* per share had been credited as paid up in pursuance of a contract dated March 6, 1882. This contract was entered into by a trustee for the company, and was filed with the Registrar of Joint Stock Companies contemporaneously with the memorandum and articles of association, to which it was scheduled.

The original articles of association did not contain power to reduce the capital, but, by special resolution of the company duly passed and confirmed in accordance with s. 51 of the Companies Act, 1862, at extraordinary general meetings of the company held respectively on March 5 and 24, 1896, it was resolved that the articles be altered by the addition of an article providing that the company might from time to time reduce its capital by (inter alia) reducing the liability on any shares, or by

paying off any capital which might be in excess of the wants of the company, or partly in one manner and partly in another.

At extraordinary general meetings of the company held respectively on May 7 and 22, 1896, the following special resolutions (inter alia) were passed and confirmed:—

(2.) That the capital of the company be reduced from 780,000*l.*, divided into 7800 shares of 100*l.* each with 87*l.* 16*s.* paid thereon and 12*l.* 4*s.* uncalled, to 546,000*l.* divided into 7800 shares of 70*l.* each with 65*l.* 16*s.* paid up thereon and 4*l.* 4*s.* uncalled, and that such reduction be effected

(*a*) By extinguishing the liability in respect of the uncalled capital to the extent of 8*l.* per share on each of the shares of the company;

(*b*) By returning to the shareholders paid-up capital to the extent of 22*l.* per share.

(3.) That the said 7800 shares of 70*l.* each with 65*l.* 16*s.* paid thereon be subdivided into 54,600 shares of 10*l.* each with 9*l.* 8*s.* paid up on each share.

(5.) That the directors be and they were thereby authorized to create an issue of debentures for a total sum not exceeding 139,000*l.*, subject to certain specified provisions.

(6.) That the directors be and they were thereby authorized to issue the debentures to such of the shareholders as should consent to accept the same at par in part satisfaction of the cash to be repaid to them on their shares as thereinbefore provided, but so that the amount per share to be so satisfied should not exceed 18*l.*; and that as regarded any debentures which should not be so accepted by the shareholders, the directors should be authorized to dispose of them to such persons whether shareholders or not, and upon such terms as they thought fit.

The petition stated that the company had carried on business with great success and had made large profits; that at the date of the passing of the special resolutions above referred to the capital of the company was, to the extent of 22*l.* per share, in excess of its wants; that as regarded 4*l.* per share, it was proposed to repay that amount to the shareholders in cash; and as regarded the remaining 18*l.* per share, it would be for the benefit

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of the company to repay that amount as share capital, and to borrow the same upon debentures in accordance with the scheme of the resolutions; and all the shareholders had agreed to accept debentures at par in satisfaction of such 18*l.* per share on the shares held by them.

The form of minute proposed to be registered under s. 4 of the Companies Act, 1877, was as follows:—

"The capital of Nixon's Navigation Company, Limited and Reduced, is henceforth 546,000*l.*, divided into 54,600 shares of 10*l.* each, instead of the original capital of 780,000*l.*, divided into 7800 shares of 100*l.* each. At the time of the registration of this minute the sum of 9*l.* 8*s.* has been and is to be deemed to have been paid up on each of the said shares."

The petition further stated that the company had no debts except those incurred in the ordinary course of business, which were always discharged as soon as they became due; and it asked that the second special resolution and the reduction to be effected thereby might be confirmed, and that the proposed minute might be approved by the Court.

Upon the petition coming on for hearing on December 19, 1896, doubts were raised, having regard to the decisions in *Hartley's Case* (1), *Mackley's Case* (2), *Dalton Time Lock Co.* v. *Dalton* (3), and *Smith* v. *Brown* (4), whether the contract of March 6, 1882, was sufficient to absolve the shareholders from liability to pay in cash the 81*l.* per share which under the said contract was credited as paid up on each share. Under these circumstances the hearing of the petition was adjourned in order to enable the shareholders to consider their position. The shareholders then determined, so as to prevent the question from being raised hereafter, to apply to the Court for orders directing the register of the company to be rectified by striking out the names of the shareholders as holders of the shares then held by them, and to enter into and file with the Registrar of Joint Stock Companies a fresh agreement for the issue of shares with 87*l.* 16*s.* credited as paid up thereon, and, in pursuance of the new agreement and of the orders of the Court, to have

(1) (1875) L. R. 10 Ch. 157.
(2) (1875) 1 Ch. D. 247.
(3) (1892) 66 L. T. (N.S.) 704.
(4) [1896] A. C. 614.

shares of the same value and number as the old shares issued to them, each being credited with 87*l.* 16*s.* as paid up.

The necessary steps and orders for carrying out this resolution having been taken and obtained, the petition now came on again.

Buckley, Q.C., and *Theobald*, for the company, referred to *In re Lamson Store Service Co.* (1)

(1) Reported on another point, [1895] 2 Ch. 726.

In the case of *In re Lamson Store Service Co., Limited*, the original capital of the company was 85,000*l.*, divided into 8500 shares of 10*l.* each. The petition for reduction stated that the capital of the company was far in excess of its requirements; and resolutions had been passed that the capital should be reduced by cancelling 500 shares which had not been taken or agreed to be taken, and by paying off as capital in excess of the wants of the company the capital paid up on 4000 of the shares of the company, and which had been purchased by the company itself, and extinguishing the liability in respect of uncalled capital upon certain of the 4000 shares which had not been fully paid; and further, by paying off the capital paid up on 2000 shares of the company by, in effect, returning the money to the shareholders, and borrowing it from them on debentures. The resolutions provided that debentures should be issued to the respective holders of the said 2000 shares to a total nominal amount equal to the amount paid up respectively on the shares of the said respective holders, such debentures to constitute an issue of 4000 debentures of 5*l.* each ranking pari passu with each other, and bearing interest at the rate of 5 per cent. per annum, and such debentures to mature for payment in the event of the company being wound up, and then not to rank for payment until the other creditors of the company should have been paid off in full, or should have received in dividends 20,000*l.*, and then to rank against any surplus assets in priority to such creditors, with power to the company to redeem all or any of the said debentures at any previous time out of the net profits of the company, upon giving to the holders thereof three calendar months' notice in writing of its intention so to do, the debentures to be redeemed on any such occasion to be selected by lot from those for the time being outstanding.

The form of minute proposed to be registered was as follows: The capital of the Lamson Store Service Company, Limited, henceforth is 20,000*l.*, divided into 2000 shares of 10*l.* each, instead of the original capital of 85,000*l.* divided into 8500 shares of 10*l.* each. At the time of the registration of this minute the sum of 10*l.* has been and is to be deemed paid up on each of the said 2000 shares.

The petition asked that the proposed reduction might be confirmed, and that the above-mentioned minute might be approved by the Court.

The chief clerk's certificate as to the creditors of the company shewed that on October 21, 1895, there were only four persons who claimed to be creditors. Two of these were officers

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STIRLING J. made an order confirming the reduction and approving the proposed minute.

Solicitors: *Gadsden & Treherne.*

G. A. S.

STIRLING J. 1897 *March* 19; *April* 3.

In re REDDING. THOMPSON *v.* REDDING.

[1891 R. 1004.]

Will—Construction—Tenant for Life and Remainderman—Leaseholds—Ground-rents—Repairs and Outgoings—Corpus or Income.

Testator directed his executors and trustees to arrange his affairs and manage his estate, and to retain certain leaseholds and let them on lease at fair rentals, and pay the income derived therefrom to his wife for life for the benefit of herself and her children, and after her decease to divide the whole of his estate equally between his children:—

Held, on the construction of the will, that the "income derived" from the leaseholds meant the net income, i.e., the amount of the rents after deducting all proper outgoings, and that consequently ground-rents, current repairs, and other outgoings in respect of the leaseholds must be borne by the tenant for life.

The view taken in *In re Baring*, [1893] 1 Ch. 61, of the decision in *In re Courtier*, (1886) 34 Ch. D. 136, dissented from.

ADJOURNED SUMMONS.

William Redding by his will, dated September 6, 1888, appointed his wife S. Redding, and his friends S. Thompson and G. W. Fry, executors and trustees to arrange his affairs, manage his estate, and carry out his wishes and desires. Then he directed that all his just debts, funeral and testamentary and other expenses, be paid and satisfied as soon as conveniently

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of the company who had consented in writing to the proposed reduction of capital, and the other two were creditors in respect of rent of the company's premises, the amount of their respective claims being 7*l.* 5*s.* and 9*l.*

Jan. 15, 1896. STIRLING J., upon production of an affidavit (1.) that the 9*l.* and 7*l.* 5*s.* had been paid; (2.) that certain named persons were all the shareholders of the company and had agreed to accept the debentures in satisfaction of the shares; and (3.) that the debentures had been created and issued, made an order in accordance with the prayer of the petition.

might be after his decease. And immediately after his decease he requested his executors and trustees to take in hand the various businesses carried on by him, and manage the same until they could advantageously be put in the market, and to obtain the highest possible price for them. He directed his executors and trustees to sell the various premises he held at rack-rentals as early as practicable and to the highest advantage. And certain premises (naming them), held at ground-rents, he wished to be retained by his trustees and let on lease or otherwise at fair rentals, together with all other property which he might hold at nominal ground-rents which might be acquired by him at any time, and the income derived therefrom to be devoted as thereinafter described. He then generally "directed and devised" that after the collection of and gathering together of all outstanding assets, the proceeds of the sales of the various premises, &c., and of all sums to which he might be entitled or which might become due to him at the time of his decease, and after due payment of all his just debts, liabilities, testamentary and other expenses, legacies, and other sums incidental to the settling up of his estate, the surplus remaining in their hands should be invested in Consols, Government securities, ground-rents, or freehold cottage property, and "the whole of such income from such investments" should be paid over to his said wife quarterly, or at other suitable periods, for her benefit and that of his children, and to be enjoyed by her and them during the term of her natural life, and at her decease the whole of his estate to be equally divided among his children as therein mentioned.

A question having arisen in the administration of the testator's estate whether the widow was entitled as from the death of the testator to receive the rents and profits of the retained leaseholds without any deduction therefrom in respect of ground-rents, rates, taxes, repairs, insurance and other outgoings, this summons was taken out by the executors for the determination of that amongst other questions.

P. F. Wheeler, for the summons.

Whinney, for the infant children. The will contains an

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indication as to how the cost of repairs and other outgoings is to be borne. The testator directs the trustees to manage his estate, to let the leaseholds and pay the "income to be derived," meaning thereby the net income, to his wife. When he disposes of his residue he directs the "whole income" to be paid to her. The trustees ought to discharge the ground-rents and other outgoings, including the current repairs, out of the rents of the leaseholds before paying them over to the widow. The only difficulty arises from the decision in *In re Baring* (1); but it is submitted that in that case an erroneous view was taken of the effect of *In re Courtier*. (2) In the latter case the remarks of Cotton L.J. were directed to repairs which ought to have been effected in the lifetime of the testator. As to the ground-rents, see *Hawkins* v. *Hawkins*. (3)

W. H. Cozens-Hardy, for the tenant for life. The word "management" in the will does not apply to the leaseholds but to the testator's businesses, and the word "liabilities" means every liability to which the estate is subject while there is any property under the trust. On the construction of the will the gross income of the leaseholds is payable to the widow, and the repairs ought to be borne by the corpus. *In re Baring* (1) was rightly decided. By analogy to the law of waste the tenant for life is not liable: *Brereton* v. *Day*. (4)

No reply was called for.

Cur. adv. vult.

April 3. STIRLING J. (after stating the facts). The question is whether the accruing income derived from the leaseholds is to be paid to the widow without making any deductions for payments which may be made for ground-rents or for necessary repairs (by which is meant those in respect of which the liability accrued after the death of the testator), and otherwise in performance of the covenants in the leases. It is to be observed that in the first place the testator directs the trustees to arrange his affairs, and manage his estate and carry out his wishes and desires. He imposes on them the duty of managing his estate.

(1) [1893] 1 Ch. 61.
(2) 34 Ch. D. 136.
(3) (1880) 13 Ch. D. 470.
(4) [1895] 1 I. R. 518.

No doubt he repeats the word "management" in a subsequent clause as to his businesses in the interval between his death and the sale; but he does not thereby withdraw the direction which stands in the prior portion of the will as to the management of his estate. With reference to the retained leaseholds, he directs them to be let on lease at fair rentals, and then says that the income to be derived from them is to be devoted as thereinafter described—that is, paid to the widow. What is "the income derived from them"? It appears to me that it is not the whole income which would be derived from these leaseholds without any deduction, but the income after making proper deductions in respect of these charges. "Income derived," in ordinary parlance, is understood to mean, not the gross rents, but the rents after deducting all proper outgoings. In that view I am corroborated in the language used by the testator in giving the income of his residuary estate. He there says, "the whole of such income shall be paid over to my wife." He does not say that in respect of the leaseholds. Then it is said that he directs his debts and liabilities to be paid out of his estate. No doubt he does; but if I am right in holding that income directed to be paid to the widow derived from leaseholds means net income, I cannot see that that construction can be affected by a direction to discharge liabilities out of corpus. And therefore, according to the language used, the widow must bear the expense of the proper outgoings in respect of ground-rent, rates, taxes, insurance, and other outgoings on the property. On behalf of the widow the case of *In re Baring* (1) was relied on. That case was decided partly on the language of the particular will and partly with reference to the case of *In re Courtier*. (2) As far as it depended on the language of the particular will, I shall not enter into a consideration of it. But as regards *In re Courtier* (2), I feel bound to say that, having read it carefully, I am unable to put the construction on the language used by the various members of the Court of Appeal which seems to have been put on it in that case. Certainly in point of decision *In re Courtier* (2) does not cover the present case, because it was exclusively directed to the question whether

(1) [1893] 1 Ch. 61. (2) 34 Ch. D. 136.

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the tenant for life was bound to discharge the liabilities in respect of repairs to property which had accrued at the death of the testator. The decision of the Court of Appeal was given with reference to that and nothing else, for it seems to me that when the judgments are looked at that was the sole question which the judges of the Court of Appeal dealt with. It is sufficient to refer to the judgment of Cotton L.J. After stating that the leaseholds were at the death of the testator in a condition requiring repair, he says (1): "The widow has kept them in the same state as they were in at the testator's death, but declines to put them in such a state of repair as to satisfy the covenants in the leases. With respect to that question it is admitted that the words of the will are such that it cannot be contended that there is a trust for immediate conversion." Then he goes on, and he is dealing entirely with the question whether the widow is bound to put the leaseholds in such a state of repair as they ought to have been in at the testator's death. I do not think, therefore, that *In re Courtier* (2) can be relied on as a decision adverse to that which I think ought to be given in the present case.

Solicitors for all parties: *Sheffield, Son & Powell.*

(1) 34 Ch. D. 139. (2) 34 Ch. D. 136.

G. A. S.

STIRLING J.
1897
March 11;
April 8.

In re GAME.
GAME *v.* YOUNG.

[1896 G. 1985.]

Will—Construction—Residuary Gift—Successive Interests—Leaseholds—Conversion.

A testator directed that the rents and profits of his residuary real and personal estate should be paid to his wife for life; and after her death he gave his residuary estate to others in succession, subject to certain annuities, and conferred on the annuitants a power of distress. The residuary estate included both freeholds and leaseholds:—

Held, that neither the direction to pay rents nor the power of distress afforded any sufficient indication of an intention that the leaseholds should be enjoyed in specie, and that they ought to be treated as converted at the expiration of a year from the testator's death, in accordance with the rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137 a.

Craig v. *Wheeler*, (1860) 29 L. J. (Ch.) 374, approved and followed.

Crowe v. *Crisford*, (1853) 17 Beav. 507, *Wearing* v. *Wearing*, (1856) 23 Beav. 99, and *Vachell* v. *Roberts*, (1863) 32 Beav. 140, commented upon.

THIS was an originating summons taken out by the children of George Game against the executors of the will of William Game, the testator in the action, and the trustees of the Norwich Union Fund of the Norwich Union Life Insurance Society, the purchasers of the life interest of George Game in the testator's residuary estate, to determine whether the last-named defendants as the purchasers of the said life interest were entitled to the whole of the rents and profits of certain leaseholds forming part of the testator's residuary estate, or only to a sum equal to the dividends which would be produced if the leaseholds had been sold and invested in $2\frac{3}{4}$ per cent. Consolidated Stock, and, if the latter, whether the leaseholds ought to be treated as converted at the end of a year from the testator's death, or at the death of the testator's widow, the first tenant for life under the will.

The testator, by his will dated February 12, 1887, after making certain specific bequests and devises (including a specific bequest of his furniture, plate, linen, china, pictures, books, and

STIRLING J. household effects to his wife Margaret Game for her life), proceeded as follows: "And as to all the rest and residue of my real and personal estate, whatsoever and wheresoever, which I may be possessed of or entitled to at the time of my decease, I direct that the rents and profits arising therefrom shall be paid to my wife Margaret Game for and during the term of her natural life for her own use and benefit; and after her decease I give and bequeath my said furniture, plate, linen, china, pictures, books, and household effects to and equally between the said George Game and George Young; and as to the residue of my estate real and personal, I give and devise the same to my nephew the said George Game for his life," subject to and charged with the payment of certain annuities. And the testator continued: "And on the death of the said George Game I give and devise the same, subject as aforesaid, to and equally between his children as tenants in common; and I direct that each of such annuities shall commence from the death of my said wife, and shall be payable quarterly, and that each of such annuitants shall have the same or the like remedy by distress for the recovery thereof as landlords have for recovery of rent in arrear upon a common demise."

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The testator died on May 15, 1889. At the date of his death his residuary estate consisted of a sum of 142*l.* $2\frac{3}{4}$ per cent. Consolidated Stock, and of five freehold and five leasehold houses. The testator's widow died on July 29, 1896, having received during her life the whole of the rents, profits, and income of the testator's residuary estate.

In the meantime, namely, on April 23, 1896, George Game sold his life interest under the will to the trustees of the Norwich Union Fund of the Norwich Union Life Insurance Society, and on the death of the widow they claimed to be entitled to the whole of the rents and profits of the testator's real and personal estate subject to the payment of the annuities bequeathed by the will.

Hastings, *Q.C.*, and *Theobald*, for the summons. The rule in *Howe* v. *Earl of Dartmouth* (1) must be applied, and the

(1) 7 Ves. 137 a.

leaseholds must be treated as converted unless the will contains some sufficient indication of an intention that they should be enjoyed in specie, and the burden is on those who seek to retain the property in its existing state to find an indication of such an intention: *Macdonald* v. *Irvine*. (1)

Having regard to the fact that the residuary gifts comprise both freeholds and leaseholds, neither the direction to pay rents nor the power of distress conferred on the annuitants affords any sufficient indication of such an intention, inasmuch as both those provisions can be satisfied by applying them to the freeholds.

Manby, for the executors of the will.

Buckley, *Q.C.*, and *H. Terrell*, for the assignees of George Game's life interest. The tendency of modern cases is against conversion wherever any indication can be found of an intention that the property should be enjoyed in specie: *Hinves* v. *Hinves* (2); *Thursby* v. *Thursby* (3); *Vachell* v. *Roberts*. (4)

Here the residuary gifts are direct, the annuities are charged directly on the land itself, a power of distress is given to the annuitants, and the word "rents" is used. All these circumstances taken together are sufficient to exclude the operation of the general rule. If the widow was entitled, as it is submitted she was, to enjoy the property in specie, there is no reason why the present tenant for life should be placed on any different footing.

Hastings, *Q.C.*, in reply, cited *Pickup* v. *Atkinson*. (5)

Cur. adv. vult.

April 8. STIRLING J. This summons raises a question upon the construction of the will of William Game as to whether the rule in *Howe* v. *Earl of Dartmouth* (6) applies so as to operate a conversion of certain leasehold houses forming part of the testator's residuary estate. [His Lordship referred to the will, observing that the testator treated the household

(1) (1878) 8 Ch. D. 101, 124.
(2) (1844) 3 Hare, 609.
(3) (1875) L. R. 19 Eq. 395, 410.
(4) 32 Beav. 140.
(5) (1846) 4 Hare, 624.
(6) 7 Ves. 137 a.

STIRLING J. furniture thereby bequeathed as not forming part of his residuary estate, and stated the nature of the testator's property at the date of his death, and he continued as follows :—]

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It was laid down by James L.J. in the Court of Appeal in the case of *Macdonald* v. *Irvine* (1) that the rule in *Howe* v. *Earl of Dartmouth* (2) "must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case." Accordingly, it lies on those who assert that the rule ought not to be applied in this case to point out some indications in the will of an intention that the rule is not to be applied. The indications mainly relied upon are two. First, the direction that the rents and profits shall be paid to the testator's wife followed by the gift of his residuary estate real and personal to his nephew for life charged with certain annuities, and secondly, the power of distress conferred upon the annuitants. Upon the first point several authorities were referred to, and I have looked into them and also into some others, and they appear to me to stand in a somewhat singular position. On the one hand, it is said that the use of the word "rents" implies that the testator intended the property to remain in specie; on the other hand, it is contended that the use of that word is sufficiently accounted for by the fact that freeholds as well as leaseholds are comprised in the residuary gift. That point has arisen repeatedly, and in *Harris* v. *Poyner* (3), which was before Kindersley V.-C., the Vice-Chancellor expressed his opinion upon it. There the testator gave his residuary real and personal estate upon trust to pay to his wife for life "the net or clear rents and profits, dividends, and annual proceedings and income" thereof, and after her death he gave his said real and personal residuary estate, and all his estate, term and interest therein upon trust for his son absolutely. One argument in favour of the retention of the leaseholds in specie was based upon the use of the word "rents," and upon that the Vice-Chancellor

(1) 8 Ch. D. 101, 124. (2) 7 Ves. 137 a.
(3) (1852) 1 Drew. 174, 179.

expresses himself thus: "Now, though there is mention of rents there, I agree with the argument that the word 'rents' may apply to the real estate; it is not necessary to refer that to the rents of the leasehold estate." That was a clear intimation of the Vice-Chancellor's opinion that the use of the word "rents" in a case where the residue included both freeholds and leaseholds was not of itself a sufficient reason for holding that there was no conversion of the leaseholds. In that case the Vice-Chancellor decided that the leaseholds ought to be retained; but he founded his decision not upon the use of the word "rents," but upon the use of the word "term" in the subsequent gift to the son. In *Craig* v. *Wheeler* (1), which was also a case in which both freeholds and leaseholds were comprised in the same gift, it was again contended that the use of the word "rents" was a sufficient indication of an intention not to convert. The same Vice-Chancellor there says: "In *Pickering* v. *Pickering* (2) . . . . Lord Cottenham distinctly recognised the principle, that if there is no indication of intention not to convert, there must be a conversion; so also in *Morgan* v. *Morgan* (3), decided by the Master of the Rolls. That principle I mean to adopt, unless I find on the face of the will a special and clear indication of intention that, notwithstanding that general rule, in this particular case it is not to be converted; but that the property is to remain in specie. It was observed in *Morgan* v. *Morgan* (3) that modern cases allowed small indications of intention to prevail, the absence of any indication of intention being no reason why the rule should not be applied: and not only do I concur in that observation, but I consider that modern cases allow distinctions which amount to no indications of intention at all to operate as such indications. I will not however, unless constrained by some decision exactly governing the present case, presume such intention, unless I could honestly satisfy myself that it exists." Then he goes on to deal with the particular case, and says: "A testator perhaps unnecessarily uses a number of words, and that is the case here; even if the word 'leaseholds' had been amongst them, it would

(1) 29 L. J. (Ch.) 374, 376. (2) (1839) 4 My. & Cr. 289.
(3) (1851) 14 Beav. 72.

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not have governed the question of conversion. It was said that, although the word was not used there were the words 'messuages,' 'lands,' and by the Wills Act 'lands' was sufficient to pass leaseholds in the absence of freeholds; and that the words 'rents and profits' were tantamount to a sufficient designation of leasehold property. This is a fallacy, for the testator had freeholds, and it was unnecessary to resort to the word 'lands.'. If the question was whether leaseholds passed, clearly they did; but that is not the point, and such an argument cannot prevail," and he held that the use of the words "rents and profits" did not indicate any intention to exclude the general rule.

On the other hand, there are at least three cases before Lord Romilly in which a different view has been expressed. The first is *Crowe* v. *Crisford*. (1) There a testator gave his freehold, copyhold, and leasehold estates, and all his stocks, shares, and personal estate to trustees in trust to receive the rents, issues, and profits, and thereout to keep the houses and buildings in tenantable repair and renew his leaseholds, and then to pay the net income arising from the residuary real and personal estate to his wife for life, and it was held that the wife was entitled to enjoy the leaseholds in specie. The Master of the Rolls there says: "This is not a case for conversion. A current of authorities has established the rule that where 'rents' are referred to, the person taking a life estate is entitled to the enjoyment of the property in specie; and besides, the provision as to paying fines for renewal and keeping in repair, with respect to the leaseholds, shews, that they were not to be converted." As far as decision goes, that case is not in point, because the Master of the Rolls did not rely exclusively on the word "rents"; but still he says this: "A current of authority has established the rule that where 'rents' are referred to, the person taking a life estate is entitled to the enjoyment of the property in specie." That current of authorities was not cited in the argument, and the learned judge did not himself mention the cases to which he referred. The learned reporter, however, in a note to this passage referred to *Goodenough* v.

(1) 17 Beav. 507, 509.

Tremamondo. (1) That was a case in which the word "rents" was used, but there were no freeholds, and the Master of the Rolls (Lord Langdale) held that it would be striking the word out of the gift if he did not infer an intention that the property should be enjoyed in specie. I have not to deal with that case, but I may observe that in *Pickup* v. *Atkinson* (2) Wigram V.-C. did not adopt the same view, and held that the use of the word "rents" did not afford a sufficient indication of such intention, even though the testator had no freeholds to which the word could apply. The next case is *Wearing* v. *Wearing*. (3) There the Master of the Rolls gives no reasons for his decision. He merely says this: "*Morgan* v. *Morgan* (4)" (which was cited in the argument) "was a different case. In that case there was a bequest of the personal estate, separate and distinct from the devise of the real estate, in which the word 'rents' was used." I may mention that this case was referred to by Kindersley V.-C. in *Craig* v. *Wheeler* (5), and evidently was not approved by him. Lastly, in *Vachell* v. *Roberts* (6), the Master of the Rolls says: "The word 'rents' being used, I think that I must follow the authorities cited. Where there is both freehold and personal estate the expression 'rents' would refer to and include leaseholds as well as freeholds. . . . I will make a declaration that the trustees are not bound to convert." The authorities cited in that case in favour of the view of the Master of the Rolls were *Goodenough* v. *Tremamondo* (1), *Crowe* v. *Crisford* (7), and *Alcock* v. *Sloper*. (8) In *Goodenough* v. *Tremamondo* (1), as I have already stated, there were no freeholds. In the two last cases there were other circumstances besides the use of the word "rents," pointing to an intention not to convert. These cases make it difficult to say what is the true state of the law, and I must use my own judgment upon the question. I agree with Kindersley V.-C. that where a testator has both freeholds and leaseholds, the mere use of the word "rents" is not an indication of intention that the

(1) (1840) 2 Beav. 512.
(2) 4 Hare, 624.
(3) 23 Beav. 99.
(4) 14 Beav. 72.
(5) 29 L. J. (Ch.) 374.
(6) 32 Beav. 140, 142.
(7) 17 Beav. 507.
(8) (1833) 2 My. & K. 699.

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property is to be enjoyed in specie, inasmuch as the use of that word can be satisfied by applying it to the freeholds.

The second indication which has been relied on to exclude the general rule is the power of distress conferred on the annuitants. It was obviously the intention of the testator that the annuitants should have a power of distress on land. But what land? The direction may refer to the freeholds. There is no necessary implication that the distress should be on the leaseholds. In my opinion neither of these circumstances, nor both taken together, can afford a sufficient indication of intention that the property shall be enjoyed in specie. Therefore the rule in *Howe* v. *Earl of Dartmouth* (1) must be applied, and there must be a declaration that the testator's leasehold premises ought to have been sold and the proceeds invested in Consols at the expiration of a year from the testator's death.

Solicitors: *Peters & Bolton; Marshal & Co., Hammersmith; Hartcup, Davis & Cobbold, for W. T. Hartcup, Norwich.*

H. B. H.

STIRLING J. 1897 *April* 8.

In re SAUNDERS. SAUNDERS *v.* GORE.

[1896 S. 3699.]

Appointment—Succession Duty—Stock "sufficient to raise" a net sum.

A tenant for life under a marriage settlement, in exercise of a power of appointment in favour of the children of the marriage, appointed so much of the stock held under the settlement as should be sufficient to raise the net sum of 2000*l.*:—

Held, that the appointee took subject to succession duty.

ADJOURNED SUMMONS.

By a settlement dated January 15, 1855, made on the marriage of Hugh Ward Saunders with Ellen Anne Bannerman, certain funds were in the events which happened settled upon trust for the wife for life, and after her decease upon the children of the marriage as she should by deed or will appoint.

(1) 7 Ves. 137 a.

In pursuance of the power of appointment conferred by this settlement, Mrs. Saunders, by several deeds-poll respectively dated in 1894, appointed to her son, Edward George Saunders, portions of the settled funds sufficient to raise three sums of 2000*l.*, 3000*l.*, and 4000*l.*

All the appointments were made in the same form.

By the deed relating to the 2000*l.*, she appointed "that so much of the stock, funds, shares and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of 2000*l.* shall, subject to the life interest therein of the said Ellen Anne Saunders, henceforth belong and be vested in the said Edward George Saunders and be held in trust for him the said Edward George Saunders, his executors, administrators and assigns."

Mrs. Saunders also made appointments in similar terms in favour of other children of the marriage, and ultimately by a deed-poll, dated February 14, 1895, she appointed the whole of the unappointed funds to her son Hugh Ettrick Saunders.

Hugh Ettrick Saunders subsequently assigned his interest in these funds, and was adjudicated a bankrupt.

This was an originating summons taken out by Edward George Saunders against the trustees of the settlement, the trustee in bankruptcy of Hugh Ettrick Saunders, and the assignees of his interest, to determine whether the plaintiff was entitled to receive the sums appointed to him free from succession duty.

C. S. Medd, for the plaintiff. "Net" is equivalent to "clear," and it is well settled that a gift of a clear sum means clear of duty: Hanson's Death Duties, 4th ed. p. 464; *Peareth* v. *Marriott* (1); *In re Currie* (2); *Haynes* v. *Haynes* (3); *Wilks* v. *Groom*. (4) Those cases are decisions on legacy duty; but there is no difference for the present purpose between legacy duty and succession duty.

(1) (1882) 22 Ch. D. 182.
(2) (1888) 36 W. R. 752.
(3) (1853) 3 D. M. & G. 590.
(4) (1856) 2 Jur. (N.S.) 798.

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In re Higgins (1) is distinguishable. There a father covenanted to pay to the trustees of his daughter's marriage settlement a sum free from all deductions, and it was held that that did not include succession duty, for which as predecessor he was in no way liable; but there is a distinction between a covenant to pay and an appointment of a portion of a fund which is itself liable to pay duty. [He also referred to *In re Gray* (2); *In re Shaw* (3); and *Ex parte Sitwell.* (4)]

Godefroi, for other parties in the same interest.

W. A. Peck, for the trustees of the settlement.

A. F. Peterson, for the assignees of H. E. Saunders' interest. The cases do not apply to the language of this appointment. This is not an appointment of a net sum, but of a sum of stock sufficient to raise a net sum, or the word "net" is confined to the expenses of raising that sum.

This case falls within *Sanders* v. *Kiddell* (5) and *Pridie* v. *Field.* (6) In both those cases the gift was of a fund sufficient to produce a clear annual sum which was settled on several persons in succession, and no doubt the circumstance that different rates of duty would be payable by the several annuitants was relied on as shewing that the fund was not intended to be exempted from legacy duty; but the Court also relied upon the distinction between a gift of a fund sufficient to produce a clear annuity and a direct gift of a clear annuity.

Medd, in reply. That distinction is said to be untenable in Jarman on Wills, 5th ed. vol. i. p. 151, n.

[STIRLING J. It is recognised in *Banks* v. *Braithwaite.* (7)]

STIRLING J. The question which I have to consider in this case is whether, under certain appointments, made in pursuance of a power, the appointees are entitled to take the appointments duty free; or, in other words, whether the amount of duty which would be payable in respect of the appointed funds has been given to them by the appointor as well as the sums themselves.

(1) (1885) 31 Ch. D. 142.
(2) [1896] 1 Ch. 620.
(3) [1895] 1 Ch. 343.
(4) (1888) 21 Q. B. D. 466.
(5) (1835) 7 Sim. 536.
(6) (1854) 19 Beav. 497.
(7) (1862) 32 L. J. (Ch.) 35.

Now the appointor in this case was a lady, who was tenant for life of the fund, and she has made a number of appointments which are all in the same form. [His Lordship referred to the appointment of the 2000*l.*, and continued as follows :—]

That is not an appointment of a net sum of 2000*l.*, but is an appointment of so much of the stocks and funds held by the trustees as shall be sufficient to raise the net sum of 2000*l.*

It has, with difficulty apparently on the part of many judges, been established that a direction in a will to pay a clear legacy, or to pay a clear annuity, means a legacy or annuity free of legacy duty. That has been decided by a series of cases by which I am bound. However, I am now dealing not with gifts under a will, but with a series of appointments which have been made under a settlement. But even in the case of a will it appears to me to be established by the case of *Banks* v. *Braithwaite* (1), before Kindersley V.-C., that there is a difference between the gift of a clear annuity, or a clear legacy, and the gift of a sum of stock sufficient to produce such legacy or annuity. In that case, a testator gave the residue of his personal estate to trustees upon trust to set apart 10,000*l.* Consols, and pay the dividends to his sister for life, and after her decease to retain so much of the said sum as should be sufficient to realize the clear yearly income of 150*l.*, and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them to his nephew. It was held that the nephew took the annuity subject to legacy duty. The Vice-Chancellor refers to the authorities which establish the rule that a gift in a will of a clear annuity of a definite amount means that the annuity is to be clear of legacy duty ; but he is of opinion that that is a different case. He says (2) : " That principle does not touch the present question ; for in those cases the word 'clear' was annexed to the gift of the annuity. In this case there is no gift of an annuity, but what is given is the dividend of a sum of stock. It is not said that the legatee is to have the dividends clear ; but the amount of stock is to be thus ascertained. It is such a sum of stock as would produce a clear income of 150*l.* per annum. The particular sum is 5000*l.* Consols; and that amount

(1) 32 L. J. (Ch.) 35. (2) 32 L. J. (Ch.) 36.

STIRLING J. having been arrived at, the dividends are then directed to be paid to the petitioner." Applying that reasoning to the present case, what is given here is not the net sum of 2000*l.*, but so much of the stock as will be sufficient to raise the net sum of 2000*l.*; and when that is ascertained by the proper calculation, as the Vice-Chancellor says, that particular sum of stock is to belong to the appointee. In my opinion the present case falls within the decision of *Banks* v. *Braithwaite* (1), and the appointment does not carry with it the succession duty, but the appointee takes subject thereto.

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Solicitors: *Valpy, Chaplin & Peckham; Witham, Roskell, Munster & Weld; Hasties.*

(1) 32 L. J. (Ch.) 35.

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SAXLEHNER *v.* APOLLINARIS COMPANY.

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[1896 S. 2144.]

Trade Name—Trade-mark—Rival Traders—Passing off—Deception—Intent to Deceive—Evidence of Intent—Admissibility—Injunction—Account of Profits, Form of.

Feb. 16, 17, 18, 23, 24; *March* 4.

The principle that "nobody has any right to represent his goods as the goods of somebody else," *Reddaway* v. *Banham*, [1896] A. C. 199, 204, has no limit as regards name, origin, honesty of manufacture or sale, or otherwise. Thus, a trader whose goods have acquired a reputation under a particular name can restrain the user of that name in any way whatever by a rival trader in connection with the latter's own goods, even though that reputation has been acquired by the exertions or enterprise of the rival trader as an importer and vendor on behalf of the plaintiff.

In an action for an injunction to restrain the use of a trade name, if the defendant's goods, on the face of them and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts; but if, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then evidence of intention to deceive is admissible, and this evidence may be supplied by admissions, oral or in writing, or by inference from conduct.

Reddaway v. *Banham*, [1896] A. C. 199, discussed.

Where an injunction was granted restraining the defendants from passing off their goods under the plaintiff's trade name, an account of profits was directed, as a necessary consequence, in the form allowed in *Lever* v. *Goodwin*, (1887) 36 Ch. D. 1; 4 Rep. Pat. Cas. 492, although there was no evidence that the defendants' goods had been actually mistaken for the plaintiff's.

THIS was an action by Emily Saxlehner, widow, claiming—(1.) an injunction to restrain the defendants, the Apollinaris Company, Limited, their officers, servants and agents, from passing off, or enabling or assisting others to pass off, any Hungarian bitter water, not being Hunyadi Janos water derived from the plaintiff's bitter spring near Buda Pest in the kingdom of Hungary, as or for Hunyadi Janos water, or water from the said spring, whether by means of the name or description under or with which the same was sold or offered for sale, or of the marks or insignia under or with which the same was sold

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or offered for sale, or of the advertisements or other trade notices by means of which the same was offered for sale, or otherwise howsoever; (2.) and in particular from selling or offering or exposing or advertising for sale, or procuring to be sold, any such Hungarian bitter water as aforesaid under or with, or by means of any name or description of which the name "Hunyadi" formed part, without clearly distinguishing the same from the plaintiff's water; (3.) delivery-up or destruction of all labels, capsules, and other documents and articles in the possession or power of the defendants, or under their control, which offended against either of the foregoing injunctions; and (4.) damages, or an account of profits.

The statement of claim contained allegations to the following effect. The plaintiff was the widow and successor in title of the late Andreas Saxlehner of Buda Pest. In 1863 Andreas Saxlehner purchased certain land in the neighbourhood of Buda Pest whereon was a spring of bitter water which was found to possess valuable properties as an aperient medicine. This water he proceeded to bottle and introduce into the Continental market under the distinctive name, which he himself devised and adopted for it, of "Hunyadi Janos" (meaning "John Hunyadi"), the name of a famous Hungarian patriot who died in the fifteenth century. The sale of this water rapidly increased, and ever since 1863 an extensive wholesale export trade in it had been carried on, at first by Andreas Saxlehner himself, and since his death in 1889 by his widow, the plaintiff, the water being always sold and dealt in either under the name of "Hunyadi Janos" Water, or under some abbreviation thereof, such as "Hunyadi" or "Janos" alone; but the full name "Hunyadi Janos" was placed prominently on the bottles and cases. For a few years the water was sold only on the Continent; but in July, 1870, Andreas Saxlehner began to introduce it into the United Kingdom, where it rapidly became popular. In 1873 the defendants, the Apollinaris Company, Limited, through their then managing director, Edward Steinkopff, approached Andreas Saxlehner with proposals for taking charge of the sale of the water in Great Britain and the United States, and on February 14, 1876, a contract was

entered into between Saxlehner and the defendants, whereby Saxlehner granted to them the exclusive sale of the water from his spring in the United Kingdom, America and all other transmarine or extra-Continental places (except Smyrna) for the term of ten years from January 1, 1876. By a supplementary agreement of February 15, 1877, the duration of the contract was extended for fifteen years from January 1, 1886, that is to say, until December 31, 1900; but power was reserved to the defendants by the principal contract to determine the same at any time on twelve months' notice. Such notice was given in March, 1895, and the contract came to an end on March 31, 1896.

In 1888 Steinkopff purchased on behalf of the defendant company certain lands near Buda Pest containing bitter medicinal springs called "Rakoczy" or "Uj Rakoczy," but which name he changed to "Uj Hunyadi" (meaning "New Hunyadi"): no water, however, from those springs was sold until very recently, as hereinafter mentioned. Steinkopff then, on his own behalf or on behalf of the defendant company, registered in Hungary a label almost identical with the plaintiff's, except that the name "Uj Hunyadi" was substituted for "Hunyadi Janos"; but this label was subsequently removed from the Hungarian register as being an imitation of the plaintiff's label.

In 1888 the defendants began to paste over the labels on the bottles of Hunyadi Janos Water supplied to them by Saxlehner under his contract a small yellow label with a red diamond thereon, this label being placed over the part of the original label which contained a medical testimonial to the merits of Hunyadi Janos Water as compared with Friedrichshall Water, a German bitter water which the defendants were selling; and ever since that date the defendants had continued to sell all the Hunyadi Janos Water disposed of by them in the United Kingdom and elsewhere in bottles having this red diamond mark pasted over the original label, and for about eight years past the red diamond had formed a conspicuous feature of the get-up of the Hunyadi Janos Water as sold through the defendants. This had been done without the consent of the plaintiff.

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The result of this was, as the plaintiff alleged, that a considerable portion of the public was led to believe that they were not getting genuine water from the plaintiff's spring unless the bottles bore a red diamond mark.

After the defendants gave the plaintiff notice, in March, 1895, to terminate their contract, they promoted a Hungarian "Uj Hunyadi Company, Limited," registered in Hungary, which took over the lands and springs purchased by Steinkopff in 1888; and they also at the same time promoted an English company under the same name, and then began to import and put on the market water from those springs under the name of "Apenta, a natural Hungarian Aperient Water bottled at the Uj Hunyadi Springs, Buda Pest," the word "Hunyadi" occurring four times conspicuously on the bottles (which were the same in appearance as those used by the plaintiff), and once also on the capsules. The small yellow label with the red diamond appeared on the "Apenta" bottles as it had done on the "Hunyadi Janos" bottles, though in a slightly different position. The plaintiff complained that the general get-up of the defendants' "Apenta" bottles, with the labels bearing letterpress praising the water in terms practically the same as those which had for many years been applied by the defendants themselves to the plaintiff's water, and also the defendants' published notices, advertisements, and testimonials with reference to their Apenta Water, in which the name "Hunyadi" occurred, were most injurious to her; and accordingly, on June 25, 1896, she issued the writ in this action, claiming the relief above mentioned.

In their statement of defence the defendants alleged that "Hunyadi" was a name generally used to describe all bitter waters coming from the same district, and that Apenta Water might be consistently described as a Hunyadi water, though, as a matter of fact, it possessed medicinal properties superior to those of the plaintiff's water; also that the red diamond mark had been for many years applied by the defendants to a great number of other waters besides Hunyadi Janos; and they denied that the name or label or get-up adopted for Apenta Water was intended or calculated to deceive the public.

Issue having been joined, the action now came on for trial.

when a large number of witnesses were called on both sides. The general effect of the evidence sufficiently appears from his Lordship's judgment.

Warmington, Q.C., *Neville, Q.C.*, and *Sebastian*, for the plaintiff. What we are seeking to restrain is the use of the word "Hunyadi" in connection with the defendants' water, the ground of our case being that our water has gained a reputation under this particular name in the United Kingdom ever since 1870. The principle on which relief is given where a name, mark, or brand adopted by a trader to distinguish his goods is adopted by a rival trader is now well established: *Seixo* v. *Provezende* (1); *Reddaway* v. *Banham* (2); *Powell* v. *Birmingham Vinegar Brewery Co.* ("Yorkshire Relish"). (3)

We do not object to the defendants selling their water under the name of "Apenta"; what we object to is the use of the word "Hunyadi" in connection with it. It is clear that, in adopting the word "Hunyadi"—a word which we ourselves invented or adopted, and which, until we used it, was never known in connection with any of the springs in this particular district near Buda Pest—the defendants have been endeavouring to avail themselves of our reputation. Evidence of intent is a material consideration in these cases: *Reddaway* v. *Banham* (2); *Croft* v. *Day*. (4) And the evidence here clearly shews an intent on the part of the defendants to put themselves in a position to be able to place "Hunyadi" Water on the market. This intent is shewn by the purchase of the Rakoczy spring and the alteration of its name into "Hunyadi"; also by the notice to determine the contract, and then starting another company in Hungary and England under the name of "Uj Hunyadi," and proceeding to sell Apenta Water as Hunyadi Water. We further rely, as being evidence of intent, upon the affixing by the defendants of their red diamond mark to the bottles of our Hunyadi Water. If we are entitled, as we submit we are, to an injunction—which we shall be content to have limited to sales in the United Kingdom—we are also

(1) (1866) L. R. 1 Ch. 192.
(2) [1896] A. C. 199.
(3) [1894] A. C. 8.
(4) (1843) 7 Beav. 84.

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entitled, as a necessary consequence, to an account of profits: *Lever* v. *Goodwin*. (1) We prefer an account to damages.

Sir F. Lockwood, Q.C., *Warrington, Q.C.*, and *J. Cutler*, for the defendants. The charge against the defendants is in reality one of fraud, that is, of having so conducted the business of the sale of the plaintiff's water as to be able, when the contract was terminated, to step into the business and deprive the plaintiff of it. That charge we entirely repudiate, and there is no evidence whatever to support it. The large trade in the plaintiff's water in this country and from which she has benefited has been built up entirely by our exertions and to a great extent at our expense, and there is no evidence that by our conduct we have diverted any of the benefits of the contract to ourselves. It is said that, because the defendants have been the vendors of the plaintiff's water, therefore the public, when we sell any other water, may think we are still the vendors of the plaintiff's water by reason of our previous connection with it. That may be so, but the defendants are not to be blamed for that. That is a matter which should have been taken into account by the Saxlehners themselves, when by making us sole importers of their water they incurred the risk of having it identified with our name. As to the diamond mark, the evidence shews that it has no further significance than this—that it means that the goods to which it is affixed are goods imported by us. Even if your Lordship should grant an injunction to restrain us from using the word "Hunyadi," it does not follow that the plaintiff is entitled to an inquiry as to damages or to an account of profits; the plaintiff is only entitled to such an inquiry or account when he pleads and proves special damage by loss of custom, or otherwise through the use of his trade-mark or trade name, and no such damage has been pleaded or proved here: Seton on Judgments, 5th ed. p. 544; *Leather Cloth Co.* v. *Hirschfield* (2); *Davenport* v. *Rylands* (3); *Fritz* v. *Hobson* (4); *White* v. *Mellin*. (5)

Warmington, Q.C., in reply, referred, upon the points that

(1) 36 Ch. D. 1; 4 Rep. Pat. Cas. 492.
(2) (1865) L. R. 1 Eq. 299.
(3) (1865) L. R. 1 Eq. 302.
(4) (1880) 14 Ch. D. 542.
(5) [1895] A. C. 154.

evidence of intent to deceive was admissible, and that the plaintiff was entitled to an account of profits, to *Reddaway* v. *Banham* (1); *Wotherspoon* v. *Currie* (2); and *Lever* v. *Goodwin*. (3)

[KEKEWICH J. referred to *Edelsten* v. *Edelsten* (4) and *Mitchell* v. *Henry*. (5)]

Cur. adv. vult.

March 4. KEKEWICH J. The plaintiff's case, as opened, was brought distinctly within the authority of *Reddaway* v. *Banham* (1), which, be it observed, was decided by the House of Lords some time before the issue of the writ in this action. It is important to note what that authority really is. There is no novelty in the principle stated, and even the language finds a counterpart in many older cases, as for instance *Seixo* v. *Provezende*. (6) But yet the law is so clearly put on a simple and intelligible basis, that one necessarily makes it the starting point in consideration of questions of this class. I have studied the case with this view, and it seems to me that the entire doctrine is summed up in one sentence in the first paragraph of the Lord Chancellor's speech moving the judgment of the House: "Nobody has any right to represent his goods as the goods of somebody else." Observe that the proposition is perfectly general. There is no limit as regards name, origin, honesty of manufacture or sale, or otherwise; and, although there are elsewhere to be found learned and useful disquisitions on the facts of the particular case, the application of the law to them and criticism of earlier authorities, there is no departure from what the Lord Chancellor states to be "the principle of law." It matters not, therefore, how a plaintiff's goods come to acquire a particular value, or how the defendant's goods have come to adopt that value. If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow, and the plaintiff is entitled to relief against him.

I will now apply that principle to the case in hand. By

(1) [1896] A. C. 199.
(2) (1872) L. R. 5 H. L. 508.
(3) 36 Ch. D. 1; 4 Rep. Pat. Cas. 492, 502.
(4) (1863) 1 D. J. & S. 185.
(5) (1880) 15 Ch. D. 181.
(6) L. R. 1 Ch. 192.

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reason of the exertions of the Apollinaris Company, the sole importers into this country of Hungarian Bitter Water derived from the plaintiff's spring, that water, before March 31, 1896, had become widely known and highly valued as "Hunyadi." Its full name was "Hunyadi Janos," and the evidence shews that it was known by this full name, and also by the word "Janos" alone, but that the common description by which it was mainly known in the trade, and by which it was applied for by purchasers, was "Hunyadi."

[His Lordship then discussed the evidence relating to the use by the defendants of the word "Hunyadi" in connection with their "Apenta" water, and held that the right to use the word "Hunyadi" belonged exclusively to the plaintiff, and that she was therefore entitled to an injunction and incidental relief, together with her costs of the action so far as it had been occasioned by the defendants' use of the word. His Lordship then continued :—]

A more formidable item is the diamond mark which from a certain date appeared on the bottles of "Hunyadi" imported by the defendants and was continued on "Apenta." The diamond mark gave rise to a prolonged discussion on the admissibility and value of what is styled "evidence of intent," and such remarks as it occurs to me to make on that point can conveniently be made here. I will be brief and not attempt to deal with the subject as fully as it deserves. If in a case like the present the defendants' goods on the face of them, and having regard to surrounding circumstances, are calculated to deceive, it seems to me that no evidence is required to prove the intention to deceive, nor ought time and money to be expended on any such evidence. The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts, and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive. There can be no better evidence of intention to deceive than that of the deceiver himself, and this evidence may be given with equal force by

admissions, oral or in writing, or by inference from conduct. If the intent to deceive be once established, it is but a short step, though it is a step, and not an inevitable one, to the conclusion that the intention has been fulfilled and that the goods are calculated to deceive. I am by no means sure that any such distinction as I have just briefly formulated between the two classes of cases has ever been sanctioned by judicial authority. A case cited by Mr. Warmington on this point, and some others which have occurred to me, seem to leave any such distinction at large, but my notion is that it has nevertheless been observed in practice, and that evidence of intent has only been used in the second class above noticed.

In the report of *Wotherspoon* v. *Currie* (1), a passage from Lord Chelmsford's judgment is converted into a head-note, as if expressing the decision of the House. In this sense it is inaccurate, but I take it to mean very much what I have said, though the language is capable of a different interpretation.

I observed during the arguments, and I desire here to repeat, that I fully concur with Collins J. in thinking that the fourth of the questions put by him to the jury in *Reddaway* v. *Banham* (2) was unnecessary. If the third question was answered in the affirmative, the fourth was not required, and, if in the negative, it was futile. I hope and believe that in expressing this opinion I am not running counter to the views of the noble and learned Lords who took part in the decision of that case, notwithstanding that some of them did remark on the point raised by the fourth question. The actual decision seems to me to have been governed by the answer to the third question, and, the goods being found calculated to deceive, evidence of intent was not required, and, if given, might be disregarded.

Whether my views respecting the admissibility and value of evidence of intent be right or wrong, it is clear that such evidence was admissible in this case as regards the diamond mark. In my judgment, the attachment to "Apenta" of the diamond mark of the defendants was not by itself, or regarded in connection with "Hunyadi," calculated to deceive, and, if

(1) L. R. 5 H. L. 508. (2) [1896] A. C. 199.

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it can fairly be adjudged deceitful, it must be because it had been adopted for "Hunyadi," and continued on "Apenta," with fraudulent intent. There is a large amount of evidence on this point, both oral and documentary, but, to my mind, it fails to establish the plaintiff's contention. It is proved to my satisfaction that the defendants used the diamond mark only as their trade-mark, that is, as a mark to indicate that the goods to which it was attached were sold by them; and, if once it became their legitimate trade-mark in this sense, I see no reason why they should not continue it on "Apenta," or why it should be calculated to deceive. The argument to the contrary rests on the evidence that the other waters to which the diamond mark was attached had a comparatively small sale, and I am invited to conclude that it was attached to these other waters merely as a blind in order to give a plausible pretext to attaching it to "Hunyadi," with a view of attaching it to some water which might take the place of "Hunyadi" after the determination of the contract. I am far from saying that it constitutes no evidence for a jury, that is to say, no evidence from which the conclusion might not be reasonably made, but it fails to satisfy me.

The result is that so far as the plaintiff seeks an injunction and incidental relief respecting the diamond mark, and the other details which were briefly referred to above, the case breaks down; and, inasmuch as in connection with all these she has charged fraud, the failure must carry costs.

There remains one point of a serious character. The plaintiff claims, in addition to an injunction and delivery-up of offending labels and other documents, both of which I propose to grant in a limited form, "damages or an account of profits," and by her counsel at the bar she elects to ask for an account of profits. If this were granted it would take this form: "an account of the profits made by the defendants since 31st March, 1896, by means of the sale in the United Kingdom of Hungarian Bitter Water, under a name or description of which the name 'Hunyadi' forms part without clearly distinguishing the same from water derived from the plaintiff's spring." Such an account has been frequently directed in cases of this character. It would

be too much to say that it has always been directed, and *Reddaway* v. *Banham* (1) is an instance to the contrary, but it certainly has often been done, and perhaps, when asked, almost as a matter of course. It was directed in *Edelsten* v. *Edelsten* (2), where the Lord Chancellor affirmed the Vice-Chancellor's decree according to the prayer of the Bill set out at p. 189. I venture to doubt whether the propriety of directing such an account in a case like the present has ever been fully considered. It seems to have been assumed that the right to use and protect what is styled a common-law trade-mark, to distinguish it from a registered trade-mark, is a species of property carrying with it all the rights and remedies incidental to property, and that therefore the account of profits follows the injunction as a matter of course, as it does when a successful plaintiff asks it in a patent case. The notion that a common-law trade-mark is, strictly called, "property," rests, to some extent at least, on Lord Westbury's judgment in *Edelsten* v. *Edelsten* (2); but I am by no means sure that he really so decided or that his language fairly bears that interpretation, though I observe he repeats the term in speaking of "Glenfield" in *Wotherspoon* v. *Currie*. (3) The point was raised by Lord Herschell in *Reddaway* v. *Banham*. (1) It did not fall for decision, and Lord Herschell did not purport to express a definite opinion; but I respectfully concur in the doubt stated at the bottom of p. 209, whether it is accurate to speak of there being "property" in such a trade-mark. If at liberty to express an opinion, I should wish to say that if there be no property in such a trade-mark, the right to an account of profits does not necessarily follow the injunction, and the consequences of directing an account here are so serious that I should be unwilling to do it unless compelled by authority. The evidence shews that since March 31, 1896, "Hunyadi" and "Apenta" have been both largely sold. They have been rivals, and no doubt the sale of either will decrease the sale of the other, but for the reasons which I have already noticed there is no evidence, and I do not believe, that "Apenta" has in a single instance been mistaken for

(1) [1896] A. C. 199. (2) 1 D. J. & S. 185.
(3) L. R. 5 H. L. 522.

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"Hunyadi." If, therefore, I direct an account such as above set out, I shall be giving the plaintiff, as it seems to me, the profits made by the defendants by means of the sale of their own water without the assistance and not by reason of the deception on which the injunction is founded. But I must bow, as of course I wish loyally to do, to authority. The precise point was raised and decided in *Lever* v. *Goodwin*. (1) Chitty J. had directed an account of profits, and his decision was upheld by the Court of Appeal on the express ground that the defendants, who had sold only to middlemen, were liable in this way for having enabled those middlemen to sell their goods in a fraudulent dress, and that it was immaterial how the middlemen dealt with them. All the members of the Court of Appeal concurred in this view, but the reasons for their conclusion are set forth at length in the judgment of Cotton L.J. It must be that the arguments to the contrary which struck me as forcible are really unsound. The reasoning which satisfied the Court of Appeal is equally in point here, and it must also satisfy me.

The judgment will be to the following effect: An injunction to restrain the defendants, their officers, servants and agents from selling or offering, or exposing or advertising for sale in the United Kingdom, any Hungarian bitter water, not being Hunyadi Janos water derived from the plaintiff's spring near Buda Pest, in the kingdom of Hungary, under or with or by means of any name or description of which the name "Hunyadi" forms part, without clearly distinguishing the same from water derived from the said spring. Delivery-up or destruction of all labels and other documents, and also capsules, in the possession or power of the defendants or under their control which exhibit the name "Hunyadi" in connection with Hungarian bitter water without clearly distinguishing the same from water derived from the said spring. An account of profits as above set out, which I have limited to sales in the United Kingdom, as it was agreed that the injunction should be. The defendants to pay the plaintiff's costs of action, except so far as they have been increased by the plaintiff charging deception otherwise than by the use of the word "Hunyadi" in respect

(1) 36 Ch. D. 1; 4 Rep. Pat. Cas. 492.

of which the injunction is granted. The plaintiff to pay the defendants' costs incurred in respect of matters thus excepted.

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Solicitors: *Eyre, Dowling & Co.; Janson, Cobb, Pearson & Co.*

G. I. F. C.

In re HAYWARD. HAYWARD *v.* HAYWARD.

[1897 H. 110.]

KEKEWICH J.
1897
March 19.

Tenant for Life—"Bankruptcy"—Foreign Bankruptcy—English Domicil—Forfeiture.

The life interest of a domiciled Englishman under a trust by will determinable on bankruptcy or alienation:—

Held, not to be forfeited by an adjudication in bankruptcy made by the Supreme Court of New Zealand after the death of the testatrix, but subsequently annulled.

In re Blithman, (1866) L. R. 2 Eq. 23, followed.

JOSEPHINE ELIZABETH HAYWARD, widow, by her will, dated in 1882, bequeathed to trustees the sum of 4000*l.* upon trust for investment "and to pay the interest, dividends and income thereof to my son Frederick Berger Hayward, if not at my death outlawed or an undischarged bankrupt, or through his own act or default, or by operation or process of law, or otherwise, disentitled personally to receive and enjoy the same, during his life or until he shall be outlawed or become a bankrupt or file a petition for liquidation of his affairs, or shall assign, charge or incumber, or attempt to assign, charge or incumber, the said interest, dividends and income or some part thereof, or shall do or suffer something whereby the same or some part thereof would, through his own act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons: and from and after the determination of the trust hereinbefore contained in favour of the said F. B. Hayward, or in the event of the failure of that trust," upon similar trusts

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to those thereinafter declared concerning her residuary estate. And the testatrix gave her residuary estate upon certain trusts under which Jessie Jane Hayward, widow, was entitled to a moiety thereof during her life or widowhood.

The testatrix died on February 1, 1892.

In March, 1886, Frederick B. Hayward left England for New Zealand, where he remained until April, 1895, when he went to New South Wales, where he still was. On December 16, 1895, he was adjudicated bankrupt by an order of the Supreme Court of New Zealand, on a creditor's petition; but the debts, amounting to only about 30*l.*, were subsequently paid by the trustees of the will out of money in their hands representing accumulations of income of the legacy, and the bankruptcy was annulled by an order of the same Court in December, 1896, notice of which order was duly advertised by the official assignee.

The question was, whether F. B. Hayward's interest in the legacy had been determined by his bankruptcy in New Zealand. This question was raised for the opinion of the Court upon an originating summons taken out by the trustees of the will against F. B. Hayward and Mrs. Jessie Jane Hayward, widow, the tenant for life or widowhood of a moiety of the residuary estate, and thus entitled in the event of failure of F. B. Hayward's interest in the legacy.

The evidence shewed that the domicil of F. B. Hayward's parents had been English, and that he himself had never had a permanent home out of England, nor had ever acquired any other than an English domicil.

By the New Zealand Bankruptcy Act, 1892 (56 Vict. No. 24), it is enacted that "upon adjudication the property of the bankrupt whatsoever, and wheresoever situate, shall vest in the official assignee of the court in which the order of adjudication was made, as such official assignee."

W. Freeman, for the plaintiffs, the trustees.

Mark L. Romer, for the defendant, F. B. Hayward. There can be no doubt, upon the authorities, that under a clause of this kind there is no determination of the life interest until the

debtor has become subject to the bankruptcy law: *Metcalfe* v. *Metcalfe* (1), and the cases there cited.

Then the question is, Did the income of the legacy ever become in fact "vested in or payable to" the official assignee in New Zealand under the bankruptcy law of that Colony? I submit that it could only have done so if the bankrupt's domicil had been in New Zealand: *In re Blithman* (2); and the evidence is clear that his domicil was and is English. *In re Davidson's Settlement Trusts* (3) will probably be cited against me; but that case is distinguishable, for there the insolvent voluntarily submitted to the Colonial jurisdiction, since he was adjudicated insolvent upon his own petition. The doctrine that the right of a court of a foreign country to administer the personal estate of a debtor depends upon his being domiciled in that country, is recognised in Westlake on Private International Law, 3rd ed. p. 152, s. 134.

E. F. Ball, for the defendant, Jessie Jane Hayward. In the first place, looking at the language of this clause, apart from the question of domicil, F. B. Hayward has, as a matter of fact, become "a bankrupt"—a word which is sufficient to include any bankruptcy recognised as such by the English law, and the English law will recognise a Colonial bankruptcy: *In re Aylwin's Trusts* (4); Bankruptcy Act, 1883, s. 118. I submit, therefore, that F. B. Hayward forfeited his life interest when he was adjudicated bankrupt by the New Zealand Court. As to *In re Davidson's Settlement Trusts* (3), the key-note of the decision is that the English Courts will recognise orders in bankruptcy made by other courts of competent jurisdiction quite independently of the question of domicil. Then by the Bankruptcy Act, 1883, it is enacted by s. 4 that a debtor commits an act of bankruptcy if (among other cases) in England "or elsewhere" he assigns his property to a trustee for the benefit of creditors; and if in the present case the debtor had been adjudicated bankrupt here, that would have been under s. 6, sub-s. 1 (*d*), a good adjudication vesting in his assignee here all his property wherever situate. In *In re Blithman* (2), the effect of the

(1) [1891] 3 Ch. 1.
(2) L. R. 2 Eq. 23.
(3) (1873) L. R. 15 Eq. 383.
(4) (1873) L. R. 16 Eq. 585.

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English bankruptcy law was not called to Lord Romilly's attention. The principle contended for by the other side was not applied in a Scottish appeal before the House of Lords: *Selkrig* v. *Davis* (1); and Professor Westlake admits on p. 153 of his work that that decision does not bear out his proposition on p. 152.

Mark L. Romer, in reply. I rely on *In re Blithman* (2) as a distinct authority which has never been overruled that the adjudication in bankruptcy by the court of bankruptcy in New Zealand of a debtor domiciled in England cannot vest in the New Zealand assignee property belonging to the debtor in England.

KEKEWICH J. It appears to me that there is only one question to be decided here. Upon the proper construction of this clause there is, according to the authorities, no determination or cesser of Hayward's life estate until he has become subject to the bankruptcy law so that the estate, but for this clause, would vest in and be payable to the trustee in bankruptcy or the official representing him in some other country. That being the proper construction of the clause, the only question is, Could the New Zealand court of bankruptcy bring Mr. Hayward himself and his trustees before it and make a declaration that the money is payable to the official assignee there—I mean but for this clause? That is the question. It does not seem to me entirely to turn on the question whether this was a good bankruptcy for the purpose in New Zealand. He has been made a bankrupt, and the bankruptcy law in New Zealand vests the personal property of the bankrupt in the assignee in bankruptcy. There is a meaning in the word "vest." As I am not dealing with a question of personal status, but with a question of disposition of property, I should myself, had I been unfettered by authority, have been disposed to hold that a cessio bonorum in New Zealand if properly made was equivalent to a general assignment for value, and would pass to the trustee or assignee everything that could pass from the bankrupt himself. But I find that there is certainly some authority against that view, though there is some in its favour.

(1) (1814) 2 Rose, 291; 2 Dow. 230. (2) L. R. 2 Eq. 23.

In *In re Blithman* (1) Lord Romilly bases his judgment entirely on the English domicil. He says quite plainly (2): "I am of opinion, upon examining all the cases which have been cited to me, and considering it as carefully as I can, that this is a question of domicil, and depends upon domicil alone; and that if Henwood was a domiciled Australian at the time, then that this property passed to the assignees" (an observation which seems to apply to the property I am dealing with), "but that if he was not, then it passes to his legal personal representative, and she is the person entitled to receive it." So that, applying Lord Romilly's judgment to the case before me, there can be no question but that he would have held that the money was not payable to the assignee in bankruptcy, and that it still remains payable to Mr. Hayward himself.

That case was cited and commented on by James L.J. sitting as V.-C. in *In re Davidson's Settlement Trusts* (3), and unfortunately for us he said that it was not necessary there to consider what was the principle of the decision in *In re Blithman* (1); and he distinguishes the case before him, saying: "It seems to me that the proceedings under the insolvency in Queensland cannot be disputed by the representative of the insolvent, who became an insolvent upon his own petition, who voluntarily submitted himself to the insolvency court in the Colony."

This is not the case here, and I am told that though this gentleman was made a bankrupt in New Zealand, that happened when he was gone away, the order for his adjudication in bankruptcy having been made behind his back. He was domiciled in England, and therefore I have the authority of *In re Blithman* (1) in his favour, and the case of *In re Davidson's Settlement Trusts* (3), though apparently ad rem, does not go to the extent of overruling *In re Blithman.* (1)

There is a case of *In re Lawson's Trusts* (4), but it does not help us, because *In re Blithman* (1) was not cited, though *In re Davidson's Settlement Trusts* (3) was, and North J. followed *In re Davidson's Settlement Trusts.* (3) There I think—for it is not stated—the insolvent must have been domiciled in England.

(1) L. R. 2 Eq. 23.
(2) Ibid. 26.
(3) L. R. 15 Eq. 383.
(4) [1896] 1 Ch. 175.

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Then I have Mr. Westlake's book, and s. 134, on p. 152 of the 3rd edition, goes the whole length. If you once admit as a proposition of law that the foreign curator or syndic of a bankrupt who has a foreign domicil is entitled to administer his property in England on behalf of the creditors, it follows that he is entitled to the bankrupt's personal property situate in England and by force of the foreign domicil. But Mr. Westlake, it will be observed, cites *In re Blithman* (1) and *In re Davidson's Settlement Trusts* (2), where James L.J. held that the assignee in a Colonial insolvency took the property of the debtor in England whatever might have been the domicil, because the debtor had been declared insolvent on his own petition. I have also before me Story on the Conflict of Laws, 8th ed. cap. 9, ss. 403–409. The discussion assumes that no question respecting the operation of an assignment in bankruptcy can arise unless the assignment is under the law of the country of the debtor's domicil, and in summing up in s. 409 what the learned author states to be the settled law of England, he refers to *In re Blithman.* (1) That implies that the propositions depend on the debtor's domicil.

This appears to me to be the right conclusion. In my opinion I must decide this case upon the authority of *In re Blithman* (1): if that decision is wrong it must be overruled. It is a decision by Lord Romilly of long standing, and ought not to be departed from by a judge of first instance. In my opinion I must accept it as binding on me, and say that, this domicil being English, the adjudication in bankruptcy in New Zealand did not operate to vest in the trustee or assignee property which, if the adjudication had taken place in England, would have been payable to the trustee here, or property which but for that adjudication would have been payable to Mr. Hayward for life. There must, therefore, be a declaration that the life interest has not determined. The costs of all parties, as between solicitor and client, will come out of the estate.

Solicitors: *Frank Richardson & Sadler.*

(1) L. R. 2 Eq. 23. (2) L. R. 15 Eq. 383.

G. I. F. C.

SPILLER *v.* TURNER.

[1896 S. 2717.]

KEKEWICH J.

1897

March 30.

Company—Preference and Ordinary Stockholders—Incidence of Income Tax imposed by Colonial Legislature.

An English company, which carried on business in a colony, passed resolutions under which a class of guaranteed preference stockholders became entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to the other stockholders. By a subsequent Act of the colonial legislature a duty, in the nature of income tax, was imposed on all dividends or interest paid out of assets in the colony to the members of companies carrying on business therein, and it was declared that the duty payable in respect of the amount received by any member should be a debt due by him to the Crown:—

Held, that the contract between the preference and ordinary stockholders being an English contract, the rights under it of preference stockholders, not domiciled in the colony, were not affected by the colonial Act, and that they were therefore entitled to their 6 per cent. without any deduction in respect of the colonial duty.

THIS was a special case stated by consent for the opinion of the Court, pursuant to Order XXXIV., in an action in which John Spiller (on behalf of himself and all other holders of consolidated ordinary stock of the defendant company) was plaintiff, and James Albert Turner (who had been authorized to defend on behalf of himself and all other holders of the guaranteed preference stocks, both 6*l.* per cent. and 5*l.* per cent., of the defendant company) and the Scottish Australian Investment Company, Limited, were defendants.

The defendant company was formed by means of a contract of co-partnery dated February 5, 1841, and was on October 27, 1856, duly registered under the provisions of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47). The object and business of the company were the raising of a fund to be invested in Australia and the British colonies, and the acquisition and management of land and property therein for mining, agricultural or grazing purposes, the granting of loans or advances, and other incidental transactions.

The original capital of the company was 100,000*l.* divided into 100,000 shares of 1*l.* each, with power to increase such

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capital by the creation and issue of new shares, and it was declared by the contract of co-partnery that the company should be deemed to be established in England, and that the principal office or place of business of the company should be within the city of London, and that there should be such branch offices in Australia or elsewhere as the directors might appoint. In October, 1858, the capital was converted into stock, and in April, 1864, it consisted of 300,000*l.* stock, fully paid up.

Pursuant to a resolution of the company passed on April 28, 1865, the capital was increased by the creation and issue of 200,000*l.* 6 per cent. guaranteed preference stock upon the terms and conditions following, namely, that such stock should bear and be entitled to a guaranteed interest in perpetuity at the rate of 6 per cent. per annum, and should have priority in all respects and as well in respect of principal as interest and arrears of interest (if at any time there should be any) of all stock of the company, and should be transmissible and transferable in the same manner and according to the same regulations and provisions as the other stock of the company, but so that the holders of such stock should not in respect thereof be entitled to vote or be qualified to be elected as directors of the company.

In May and June, 1879, the capital of the company was further increased by the issue of 5 per cent. guaranteed preference stock, ranking next after the 6 per cent. stock, and with a similar priority over the ordinary stock and on like conditions, except that the holders of such stock were not to "attend or" vote at any meeting of the company.

The existing capital of the company was 500,000*l.* ordinary stock, the 200,000*l.* 6 per cent. guaranteed preference stock, and 400,000*l.* of the 5 per cent. guaranteed preference stock.

The company had never been registered or incorporated in or under the laws of any colony in Australia. The head office of the company had always been situate in London, but the company had ever since its original formation carried on and still carried on business in the Colony of Queensland, and other colonies of Australia, and it had thereby made profits.

By an Act of the Legislature of the Colony of Queensland, passed on November 6, 1890 (No. X. of 1890), intituled "An Act to impose duties in respect of dividends," it was provided (by s. 2) that "dividend" should mean and include every sum of money intended to be paid or credited to or distributed among any members of or in any company, except in a winding-up or on a reduction of capital, whether the same was derived from income or from capital, and whether it was called by the name of dividend, bonus, profits, interest, or any other name; and (s. 3) that every company carrying on business in Queensland which had not its head office or chief place of business in Queensland should have a manager residing in the colony, and a principal office in the colony; and (s. 8) that in the case of companies which had no head office or chief place of business in Queensland (not being companies which carried on insurance business only) the company should, on or before April 1 in every year, forward to the Colonial Treasurer a return in the prescribed form and containing the prescribed particulars, and verified by statutory declaration under the hand of and made by the company's manager, shewing (*a*) the total average amount of the assets of the company during the preceding calendar year; (*b*) the average amount of such assets in Queensland during that year; and (*c*) the amount of all dividends declared by the company during that year, and the dates when they were respectively declared, and should at the same time pay to the Colonial Treasurer a duty equal to the sum of 1*s.* for every 20*s.*, and a proportionate sum for every part of 20*s.*, of so much of the total dividends declared by the company during the year as would be proportionate to the average amount of the capital of the company employed in Queensland during the year as compared with the total average capital of the company during the year. The Act also contained the following provisions:—

Sect. 15: "Any manager, public officer, or director of any company who pays the duty under this Act in respect of a dividend shall be entitled to deduct and retain for the use of such company, from the dividend payable to any person entitled thereto, a sum bearing the same proportion to the total duty

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payable by the company upon the dividend as the amount payable to such person bears to the total dividend upon which such duty has been paid."

Sect. 16: "When a dividend is distributed amongst any persons entitled thereto without the duty payable in respect thereof having been first deducted and paid to the Colonial Treasurer, the duty payable in respect of the amount of dividend received by any such person shall be a debt due by such person to Her Majesty."

The manager appointed in Queensland by the company for the purposes of the colonial Act of 1890, having omitted to pay duty in respect of interest paid to the guaranteed preference stockholders, the Attorney-General of the colony brought an action against him to recover such duty, and he defended the action on the ground that, upon the true construction of the Act, the dividend duty thereby imposed was not payable upon or in respect of interest paid by the company to the holders of the guaranteed preference stocks, and that such interest was not a "dividend" within the meaning of the Act; but on the hearing of the action in April, 1896, the Supreme Court of Queensland held that duty under the Act of 1890 was payable to the Crown on both kinds of guaranteed preference stock of the company.

Down to January 1, 1896, the company had paid to the holders of the 6 per cent. guaranteed preference stocks, and to the holders of the 5 per cent. guaranteed preference stock, the full amount of the interest payable in respect of such stocks respectively, with a deduction only of the income tax payable under the Income Tax Acts of the United Kingdom, and without any deduction in respect of the Queensland dividend duty. Since January 1, 1896, the company had not paid the interest on the preference stocks in full, but had deducted therefrom the amount of the dividend duty paid under the Act of 1890 to the Government of Queensland in respect of such interest, and had placed the amount so deducted to the credit of a suspense account, to abide the decision of the Court upon the questions raised in the action.

The material question for the opinion of the Court was

whether the defendant company were entitled to deduct from the interest payable to the holders of the guaranteed preference stocks, both 6 per cent. and 5 per cent., not only the income tax payable under the Income Tax Acts of the Imperial Parliament of the United Kingdom for the time in force, but also the dividend duty payable in respect of such interest, or of part of such interest, to the government of the Colony of Queensland under the colonial Act of 1890.

Bramwell Davis, Q.C., and *Upjohn*, for the plaintiff. The colonial tax imposed on the payments to the guaranteed preference stockholders ought to be borne by them, and deducted by the company from their preferential 6 per cent. or 5 per cent. The "interest," as it is called, payable to the preference stockholders is a "dividend" within the meaning of the colonial Act. The Court in Queensland has so decided, and the construction of the Act is clear. The scheme of the colonial Act manifestly is to render each person who is to receive an aliquot portion of dividend personally liable to pay a proportion of the tax. Where a number of persons employ a common fund in a foreign country, they put themselves within the jurisdiction of the government of that country to the extent of the property so employed, and it can make no difference that, as part of the machinery for their purpose, they form a company in this country, and carry on business in the name of that company. The foreign government has the same jurisdiction over them as if they were partners in a firm. By the English Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 54, which is in pari materiâ with the colonial Act, a tax is imposed on profits made in this country by a foreign corporation, and that amounts to a declaration that it is lawful to impose a tax on foreigners to the extent of assets employed here and profits made here. In this case the tax is imposed on each individual stockholder in respect of the dividend receivable by him, and not on the company generally, and the colonial Act, by requiring that each stockholder shall pay to the colonial government 1*s.* out of every 1*l.* does not involve any infringement or variation of the contract between the company and its stockholders.

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Renshaw, *Q.C.*, and *MacSwinney*, for the defendants. The rights of the stockholders in this company inter se are necessarily to be determined from the terms of the contract under which the right of preference arose, and the question is not as to the lawfulness or unlawfulness of the legislation in Queensland, but as to the effect of that legislation on the contract. Although the rights of parties under an English contract can be affected or varied by Imperial legislation, they cannot be affected or varied by foreign or colonial legislation. The special provisions of the contract will not yield to any foreign legislation. The payment to the guaranteed preference stockholders is rightly described in the resolutions of 1865 and 1879 as "interest." It is not "dividend," but a fixed rate of interest, payable out of any fund which is legally applicable, and cumulative, so that any arrears must be paid to the preference stockholders before the ordinary stockholders receive anything: *Stevens* v. *South Devon Ry. Co.* (1); *Sturge* v. *Eastern Union Ry. Co.* (2); *Henry* v. *Great Northern Ry. Co.* (3); *Matthews* v. *Great Northern Ry. Co.* (4) It is important to observe that the ordinary rights of stockholders are taken away from the preference stockholders, the 6 per cent. stockholders being not allowed to vote at meetings, and the 5 per cent. not even allowed to attend them.

Suppose that a holder of guaranteed 6 per cent. preference stock sued the company for his interest, and they pleaded tender of 6 per cent. minus income tax imposed by the Imperial Legislature, and also minus income tax imposed by the colonial legislature. It is clear that the plea as regards the colonial tax would be bad. The contract being made in England, the defendant is bound to perform it in its integrity, and it is no defence to say that a foreign power has intervened. Thus in *Jacobs* v. *Credit Lyonnais* (5), in an action on a contract by the defendants to sell esparto grass to be shipped from a foreign port, it was no defence to say that by the law which prevailed

(1) (1851) 9 Hare, 313.
(2) (1855) 7 D. M. & G. 158, 175, 178.
(3) (1857) 1 De G. & J. 606, 636, 647, 648.
(4) (1859) 7 W. R. 233; 28 L. J. (Ch.) 375.
(5) (1884) 12 Q. B. D. 589.

at the port the defendants were excused from performance because the government had prohibited the export of esparto grass. In *Smith* v. *Buchanan* (1) it was no defence to an action for debt that the defendant had been declared a bankrupt in a foreign country. The only difference in principle between that case and this is that there the plea was a discharge of the whole, and here the plea is only a discharge pro tanto. So in *Bartley* v. *Hodges* (2) a discharge under the insolvent law of Victoria was no defence to an action on an English bill of exchange, though Blackburn J. intimated that it might have been otherwise if either of the parties had been domiciled in the colony. In view of that doubt, if your Lordship decides in our favour, it might be advisable that the judgment should contain a proviso shewing that it does not determine the rights of stockholders domiciled in Queensland. It is believed that all the existing stockholders are domiciled in this country. *Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (3) is also an authority that a discharge of a debt under foreign law is no answer to an action upon an English contract.

Bramwell Davis, Q.C., in reply. The authority of the cases cited cannot be disputed, but the question between these two classes of stockholders is whether the members of this company, having assets in the Colony of Queensland, have not submitted their rights and privileges inter se to the law of the colony where the contract between them is to be performed and the profits producing the interest or dividend are earned. The intention of the parties to this contract must be taken to have been that their mutual rights as regards property in Queensland should be subject to the law of that colony, and the property being in that colony the local legislature has power to tax it: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (4); *Bank of Australasia* v. *Nias.* (5)

KEKEWICH J. It is said for the plaintiff that the stockholders of the class which he represents, and those of the classes

(1) (1800) 1 East, 6.
(2) (1861) 1 B. & S. 375.
(3) (1890) 25 Q. B. D. 399.
(4) [1894] A. C. 670, 683.
(5) (1851) 16 Q. B. 717.

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represented by the defendant Turner, the 6 per cent. and 5 per cent. guaranteed preference stockholders, whatever their rights may be, are co-partners under a certain contract of co-partnery, one of the essential conditions of which is that the business of the company shall be carried on in the Colony of Queensland, that therefore they recognise the government of that colony as having some legislative power over them, and that no one of them can complain as against the other that that legislative power has been exercised in such a way as to be detrimental to one rather than the other; that they are all bound by the legislative provisions of the colony, and must regard them whatever may be the consequences. That argument seems to me to be based on a fallacy. The contract which I have to consider in deciding this case is not the contract of co-partnery in the broad sense, providing that the business of the company shall be of a particular character, carried on in a particular manner and in certain places, including the Colony of Queensland. The contract which I have to consider is that constituted by resolutions of the company, and regulating the rights of the stockholders inter se, the ordinary stockholders on the one hand and the guaranteed preference stockholders on the other hand. [His Lordship referred to the resolutions of 1865 and 1879, and continued:—]

Those resolutions constitute the contract which establishes the rights of the ordinary and preference stockholders inter se, and it is quite immaterial for the purpose of construing that contract to consider the rights of the stockholders as a body as against the company, or the power of the company to carry on business or to submit itself to the laws of any colony. I have to construe that contract—that is to say, I have to define and ascertain what are the rights and privileges of the parties to it. The matter must be looked at from two points of view. In the first place, it must be inquired where the contract was entered into. The answer is, in England. It is an English contract, by an English company. The locus contractus is England, and therefore, if there is nothing more to vary the rights of the parties, the construction must be governed by English law. But then, in the second place, it is said that I ought to regard

the place of performance of the contract, to ascertain what the locus solutionis is, and consider whether the lex loci solutionis ought not to be applied. Now here, again, there can be no doubt that the locus solutionis is England. The company has its domicil here; it is here that the stockholder must sue to recover the interest due to him, or to have it decided whether the business is properly carried on; it is here that he must enforce his rights against the company or his fellow stockholders, or obtain an injunction to restrain any contravention of the provisions of the contract. Whether, therefore, I regard the contract from the one point of view or from the other, I find that it is an English contract, to be construed according to English law. If that is so, what avails it that the colonial legislature, having power over the company and the property of the company and the stockholders in the colony, has said in effect that the contract between the preference and ordinary stockholders shall not be performed, but that each preference stockholder, instead of having his 6 per cent., shall have 6 per cent. less the amount which the local legislature has imposed as a tax? The preference stockholder has a right to insist upon his contract here, and to disregard altogether the provisions of the local legislature, subject of course to this—that inasmuch as the company is bound by the provisions of the local legislature, the preference stockholder may not be able to get his 6 per cent. so soon as he otherwise would, but may have to wait until the next half-year for that which he would otherwise have received at once. That seems to me to be clearly the effect of the cases cited by Mr. Renshaw, and I need not refer to them particularly. If that view be the sound one, it is immaterial to consider whether the payment to the preference stockholders is interest or dividend. It is, no doubt, dividend for the purpose of the taxing Act of the colonial legislature, who may treat it as they please. As at present advised, I think that here it is not dividend, but interest as distinguished from dividend; but it seems to me immaterial, for whether it be called by the one name or the other, if once it is decided what the rights of the contracting parties are, the phraseology in which those rights are expressed is of no

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importance. It appears to me that the guaranteed preference stockholders, as they are called, having stipulated to have 6 per cent., with certain priorities and rights, paid to them, are entitled now to enforce that contract, and say that the 6 per cent. shall be paid, and it is no answer to them to say that the legislature of Queensland has taxed the company and made them pay a certain sum which has to be calculated with reference to the 6 per cent. The amount, no doubt, has to be calculated on that basis; but, nevertheless, it is not to be deducted from the 6 per cent., notwithstanding that the colonial legislature has enacted that it is to be deducted, because those legislative provisions are of no avail against the provisions of the contract in this country. The question submitted in the special case, whether the defendant company is or is not entitled to make any deduction in respect of the colonial tax, must be answered in the negative; but, in view of the suggestion which has been made by Mr. Renshaw, that stockholders domiciled in Queensland may be bound by the provisions of the colonial Act, and may therefore be in a different contractual position from other stockholders, I think the judgment ought to be expressed to be without prejudice to any question affecting any stockholder who may be domiciled in Queensland.

Solicitors: *Simpson & Co.*

C. C. M. D.

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1897
March 27; April 8.

In re SINCLAIR.
ALLEN *v.* SINCLAIR.
HODGKINS *v.* SINCLAIR.

[1893 S. 3384; 1893 S. 3565.]

Administration—Annuity determinable on Alienation—Deficiency of Assets—Valuation—Right of Annuitant to Payment.

An annuity payable to one for life or until he should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person, was secured by deed of covenant. The estate of the covenantor was insufficient for payment of the annuity in full, and, in an administration action, the annuity was valued, and was represented by a fund in court:—

Held, that the whole fund ought to be paid to the annuitant.

Carr v. *Ingleby*, (1831) 1 De G. & Sm. 362, not followed.

PETITION.

By an indenture dated June 23, 1890, and made between George Sinclair of the one part and Rose Lethbridge of the other part, George Sinclair covenanted with Rose Lethbridge that he, his executors or administrators, would, until the petitioner George William Cavendish Venn attained the age of twenty-one years, pay to Rose Lethbridge certain annuities to be applied for the benefit of the petitioner, and would, after the attainment of the age of twenty-one years by the petitioner, pay to the petitioner a clear annuity of 80*l.* during his life or until he should do or suffer some act or thing whereby or by means whereof the said annuity or any part thereof, if belonging to him absolutely, would become vested in or payable to some other person or persons, whichever should be the shorter period.

George Sinclair died in July, 1893, and in the same year these actions were commenced against Jane Sinclair, since deceased, his executrix, by creditors of his, for the administration of his estate. On December 4, 1893, an order on further consideration was made in both the actions, and by the second certificate of debts made in pursuance of that order, and filed on May 10, 1895, Rose Lethbridge was certified to be a creditor of the

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estate of George Sinclair to the amount of 1903*l.* 2*s.* in respect of the annuities covenanted to be paid to or for the benefit of the petitioner, of which amount the sum of 1642*l.* 13*s.* 6*d.* was in respect of the capitalised value of the annuities as in July, 1893, the date of the death of George Sinclair.

In pursuance of an order made in the actions on July 18, 1895, a sum of 951*l.* 11*s.*, being a dividend of 10*s.* in the pound on the sum of 1903*l.* 2*s.*, was carried over to the account of George William Cavendish Venn, an infant, and Rose Lethbridge, the wife of Charles Lethbridge, his trustee.

In pursuance of a further order made in the actions on November 25, 1895, a sum of 445*l.* 10*s.* was paid out of the funds then in court standing to the last-mentioned account to Rose Lethbridge for arrears of maintenance of the petitioner, and the further sum of 12*l.* 3*s.* 3*d.* in respect of costs, and the residue of the funds was invested in New Consols and transferred to the account of George William Cavendish Venn, an infant, in respect of the annuity provided by the deed of June 23, 1890, and the dividends on the New Consols were directed to be paid to Rose Lethbridge up to October, 1896, if the petitioner should so long live or until further order for his maintenance.

By a further order made in the actions on February 15, 1896, a second dividend of 10*s.* in the pound on the debt of Rose Lethbridge was ordered to be paid, and pursuant thereto a further sum of 951*l.* 11*s.* was accordingly invested in New Consols and carried over to the account last mentioned; and by a further order dated July 13, 1896, a sum of 5*l.* 14*s.* 2*d.* then standing to the same credit (being an unpaid dividend) was ordered to be paid to Rose Lethbridge for the maintenance of the petitioner, and the interest on the whole of the sum of New Consols then standing to the same credit, being the total sum of 1327*l.* 15*s.* 11*d.* New Consols, was ordered to be paid during the minority of the petitioner for his maintenance to Rose Lethbridge, up to and including October 5, 1896.

The petitioner attained the age of twenty-one years on November 18, 1896.

Before Rose Lethbridge was admitted as a creditor of the

estate, the annuities were valued by Mr. Colquhoun, an actuary appointed by the judge, and the fact that the annuity of 80*l.* was liable to forfeiture in certain events was fully disclosed to the actuary, who stated in his valuation that it was not possible to purchase from an insurance office an annuity calculated on a valuation of the contingency of forfeiture, and in making his valuation he disregarded that contingency. He suggested, however, that it might be possible to fix a surrender value payable in the event of forfeiture of the annuity.

The petitioner prayed that the residue of the fund remaining in court after taxation and payment of costs might be transferred to him, or, if he was not entitled thereto, then that such residue might be sold, and the proceeds might be invested in the purchase of a Government annuity during the life of the petitioner, and that provision might be made for such annuity being retained in court and paid to the petitioner during his life or until he should die or suffer some act or thing whereby or by means whereof such annuity or any part thereof, if belonging absolutely to him, would become vested in or payable to some other person or persons, or until further order.

The petition was served on Rose Lethbridge and on the executor of Jane Sinclair, the deceased executrix of George Sinclair.

Warrington, Q.C., and *E. Beaumont*, for the petitioner. The whole fund belongs to the petitioner, and ought to be transferred to him. The principle of the cases in bankruptcy is applicable. This annuitant is in the position of a creditor whose debt, though no doubt extremely difficult to estimate, is capable of being estimated. An annuity of a similar character has been treated as a provable debt: see *Ex parte Blakemore* (1) (the case of an annuity during widowhood); *Ex parte Neal* (2) (an annuity to a wife under a separation deed with a dum casta clause); *Ex parte Jackson* (3) (an annuity payable to a man so long as he did not carry on a certain business).

A. J. Allen, for the respondent, the executor of Jane Sinclair.

(1) (1877) 5 Ch. D. 372. (2) (1880) 14 Ch. D. 579.
(3) (1872) 20 W. R. 1023.

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As representing the estate of George Sinclair, the covenantor, I submit that the right course is that which was adopted in *Carr* v. *Ingleby* (1), and that the Court ought to order that 80*l.* per annum should be paid to the petitioner by periodical sales of the fund until a forfeiture of the annuity occurs, so that the right of Sinclair's estate to the chance of benefit resulting from a forfeiture should be kept alive, so long as that can be done consistently with the rights of the annuitant. The cases in bankruptcy have no application, because this annuity is in its nature incapable of being estimated. That is apparent from the statement of the actuary, who has been obliged to disregard altogether the contingency of forfeiture, and has calculated the full value of the life annuity. *Carr* v. *Ingleby* (1) is recognised in Seton on Judgments, 5th ed. vol. ii. p. 1384, as an authority, constituting an exception to the general rule established by *Wroughton* v. *Colquhoun*. (2) The Court will not treat an annuity which is determinable on a contingency during life as the equivalent of an annuity lasting during the whole of the life of the annuitant. [He referred also to *Hatton* v. *May*. (3)]

Warrington, Q.C., in reply. In *Carr* v. *Ingleby* (1) the annuitant took by bequest, and was not, as here, a creditor. The case is merely reported in a note to *Wroughton* v. *Colquhoun* (2): there is no report of the argument, but merely a statement of the facts, with the order of the Court, and the case, it is submitted, cannot be relied on as an exception to the general rule of *Wroughton* v. *Colquhoun* (2), under which, where, for convenience of administration, an annuity has to be valued, the annuitant is entitled to the whole amount set apart to answer the annuity. The principle is that the amount ascertained by valuation is substituted for the annuity in order to discharge the estate.

[KEKEWICH J. referred to *Gratrix* v. *Chambers*. (4)]

There was no valuation of the annuity in that case, and this point was therefore not before the Court.

[KEKEWICH J. referred to *Todd* v. *Bielby*. (5)]

(1) 1 De G. & Sm. 362.
(2) (1847) 1 De G. & Sm. 357.
(3) (1876) 3 Ch. D. 148.
(4) (1860) 2 Giff. 321.
(5) (1859) 27 Beav. 353.

When once it is ascertained that there must be a valuation, the fact that the annuitant, in the event of early forfeiture or early death, may in the result receive more than he would otherwise be entitled to is immaterial: *Ex parte Bates.* (1)

Cur. adv. vult.

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April 8. KEKEWICH J. The question which I took time to consider was whether the fund now representing the annuity of 80*l.* secured by the deed of covenant of June 23, 1890, might now be paid to the annuitant in satisfaction thereof, or what other provision ought thereout to be made for such annuity. It became necessary under the circumstances mentioned in the petition to value the annuity, and the fund in court represents that value. The covenant cannot be strictly fulfilled, that is to say, the annuity cannot be paid from year to year unless, which one cannot anticipate, forfeiture should ensue before the fund is exhausted. The rights of the annuitant have therefore been altered by operation of law without his default or assent. There can be no doubt that, if the annuity had been covenanted to be paid for life simply, the rule which is universally adopted in the administration of estates where annuities are given by will and cannot be paid in full would have been followed, and the fund in court would have been paid to the annuitant. This course is adopted as a rough method of giving the annuitant the best that can be obtained for him, and it is recognised as a fair solution of a problem otherwise presenting some difficulties. The practice may be said to have been settled by *Wroughton* v. *Colquhoun* (2), and it has long been of universal application in cases of the character above mentioned. The difficulty here is occasioned by the limitation of the annuity to George William Cavendish Venn for life, "or until he shall do or suffer some act or thing whereby or by means whereof the said annuity or any part thereof if belonging to him absolutely would become vested in or payable to some other person or persons." It is strange that there should be so little authority on the question what ought to be done when an annuity is thus limited, and because it cannot be paid in full has been valued and become

(1) (1879) 11 Ch. D. 914. (2) 1 De G. & Sm. 357.

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represented by a fund in the hands of executors or in court. In Seton on Judgments, 5th ed. vol. ii. p. 1384, there is this passage: "Where assets are deficient an annuity should be valued and abate proportionately, and the apportionment belongs to the annuitant absolutely: *Wroughton* v. *Colquhoun* (1); *Innes* v. *Mitchell* (2); unless given subject to condition: *Carr* v. *Ingleby*. (3)" There can be no doubt that the case of *Carr* v. *Ingleby* (3) here referred to is an authority for the exception to the general rule. There appears to be no other authority for it. Counsel have been unable to find any, and my own researches have been equally fruitless; and I may mention here in passing that I asked two learned registrars to assist me with precedents, and they were unable to do so. *Carr* v. *Ingleby* (3) is reported only as a note to *Wroughton* v. *Colquhoun*. (1) There is a statement of facts, and this, with the order, which is set out at length, justifies what is said in Seton; but there is no report of argument or judgment, and to this extent the case is unsatisfactory as a guide, standing as it does alone. I have found some later cases in which it was cited; but in none of them is there any comment on it, and the only case which it appears to have influenced is *Gratrix* v. *Chambers* (4), where Stuart V.-C. held that a proviso as to forfeiture of an annuity prevented the application of *Wroughton* v. *Colquhoun*. (1) That decision is open to two observations as regards the case in hand. First, there was no valuation of the annuity in fact (though one was urged by counsel as the proper method of arriving at the proper result); and, secondly, the Vice-Chancellor took advantage of a charge of the annuity on a share of the estate to direct it to be paid in full out of that share until exhausted. Here there has been a valuation, and the only fund out of which the annuity can possibly be paid is that with which the petition seeks to deal. It is argued on behalf of the respondent that the contingency of forfeiture was not and could not be valued. That it is difficult of valuation is true; but that it could not be valued I take leave to doubt, and in bankruptcy such valuations are of necessity made. It is im-

(1) 1 De G. & Sm. 357.
(2) (1846) 1 Ph. 710.
(3) 1 De G. & Sm. 362.
(4) 2 Giff. 321.

portant to observe that, although the continuance of the annuity depends on the non-happening of one event on the happening of which it would, so to speak, be forfeited, yet there is no gift over, and the covenantor's estate can have no claim to the fund. It seems to me that whatever I do strict technical justice is beyond my power. If the fund is paid to the annuitant and forfeiture ensues within a short period, he will get more than was intended for him. If, on the other hand, I order the dividends to be paid to him, he will certainly get far less than is due, while the fund itself would remain for the benefit of some one having no claim to it, and the first part of this result will probably follow if I take the intermediate course of directing the annuity to be paid out of income and capital until the fund is exhausted. A better attempt at justice would be made by investing the fund in the purchase of an annuity for the life of the petitioner. I say distinctly for his life, because it appears from Mr. Colquhoun's statement that it is not possible to purchase from an insurance office an annuity calculated on a valuation of the contingency of forfeiture, and what cannot be done with an insurance office is certainly out of question with that of the National Debt Commissioners. Mr. Colquhoun suggested a way in which the difficulty might perhaps be met, namely, by fixing a surrender value to accrue if forfeiture occurs; but here again I am met by the objection that there is no one to whom this advantage can properly be given. Moreover, although by reason of the covenantor's estate having paid 20*s.* in the pound there was in the first instance appropriated to this debt a sum sufficient to purchase an annuity of the full amount, yet by certain reductions which have been made, and others which must now be made, the available money is, or at any rate may be, not sufficient for the purpose. Some of the reduction is due to expenditure on maintenance of the petitioner, and to that extent he could not complain if an annuity of less than 80*l.* were secured to him; but it is a mere accident that in this case the fund ever was sufficient to purchase an annuity of the full amount, or is nearly sufficient for that purpose now. The principle properly applicable to the case must necessarily be the same whether the

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sum calculated to be the value of an annuity is provided in full out of the covenantor's or testator's estate, or so abates with other demands on the estate that only a small proportion of the annuity can be secured. Under these circumstances, and in view of the general rule of administration established by *Wroughton* v. *Colquhoun* (1), I am disposed to order the fund to be paid to the annuitant; and then the only question is whether I am prevented from doing this by the authority of *Carr* v. *Ingleby*. (2) Of course I am not competent to overrule that case; but, having regard to what has already been said, I do not think that I am bound to follow it. I shall therefore order the fund to be paid to the annuitant.

Solicitors: *W. W. Box; Allen & Son.*

C. C. M. D.

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[1896 C. 3816.]

Charity—Mortmain—Interest in Land—Pure or Impure Personalty.

Metropolitan Consolidated 3½ per cent. Stock, issued under the Metropolitan Board of Works (Loans) Act, 1869, held to be impure personalty, as conferring on the holders an interest in land within the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (iii.).

JOHN THOMAS CROSSLEY, one of Her Majesty's counsel, by his will, dated September 6, 1890, gave, devised, and bequeathed all such part and parts of his residuary estate as should consist of or should have arisen from or been produced by the investment or re-investment of property which at the time of his decease was pure personal estate capable of being lawfully bequeathed by will for charitable purposes to his executors and trustees upon trust for a charitable purpose, and gave, devised, and bequeathed all such parts of his residuary estate as could not lawfully be devised, bequeathed, or given for charitable purposes, and all other his general estate not thereby well,

(1) 1 De G. & Sm. 357. (2) 1 De G. & Sm. 362.

effectually, and completely disposed of, unto George David Greenhough absolutely for his own use and benefit.

The testator died on January 3, 1892.

The residuary estate of the testator at the time of his death comprised a sum of 4000*l.* Metropolitan Consolidated 3*l.* 10*s.* per cent. Stock, issued under the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102). (1)

An originating summons was taken out by the executors and

(1) The material provisions of the Act are as follows:—

Sect. 5: . . . . "all consolidated stock created for the purposes of the Acts mentioned in the first schedule to this Act, or of any Act hereafter to be passed, and the dividends thereon, and the sums required for the redemption thereof, shall be charged indifferently on the whole of the lands, rents, and property belonging to the Board" (i.e., the Metropolitan Board of Works), "under the Acts mentioned in the first schedule to this Act, and on all moneys which can be raised by the Board by rates under this Act, and on the improvement fund, subject to all charges existing at the passing of this Act on such lands, rents, property, moneys, and fund respectively, and shall be a first charge thereon after those charges; and all moneys required for payment of the dividends on such stock, and the sums required to be raised for the redemption of such stock as mentioned in this Act, shall be raised out of the improvement fund and metropolitan consolidated rate as in this Act mentioned."

Sect. 26: "For the purpose of paying the dividends on and redeeming consolidated stock created under this Act there shall be established a fund to be called the Consolidated Loans Fund of the Metropolis, in this Act referred to as the Consolidated Loan Fund, and, subject to the provisions of this Act, the Board shall keep a separate account of such fund."

Sect. 27: "The Board shall carry to the Consolidated Loans Fund the moneys following (after providing for all charges on such moneys existing at the passing of this Act and to which the same shall for the time being be applicable); that is to say,—

"(1.) All moneys whether in the nature of capital or otherwise arising from the sale, lease, or other disposition of lands, rents, and property belonging to the Board:

"(2.) The residue of the improvement fund which may come into their hands in the manner mentioned in this Act:

"(3.) Such an annual sum in every year out of the consolidated rate, and out of the contributions paid to the Board in pursuance of the Fire Brigade Act or out of one of such sources as may be equal to two per cent. on the total nominal amount of consolidated stock, whether it has been cancelled or not; or

"(4.) Such greater or less annual sum as the Treasury may from time to time approve as being in their opinion necessary in order to pay the dividends on and to redeem all the consolidated stock in sixty years from the date of the creation thereof."

Sect. 40: "Any person or body corporate entitled to any consolidated stock or to any security granted by the Board may, if default be made for

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trustees of the will, as plaintiffs, against George David Greenhough, Ann Brewin, spinster, and Martha Jane Beal, spinster (which two last-mentioned persons had been appointed by the Court to represent the present objects of the charity), and Her Majesty's Attorney-General as defendants, asking for the determination (inter alia) of the questions whether on the true construction of the will the whole of the testator's residuary estate was applicable for charitable purposes, or only such part thereof as consisted at the date of his will or death of personal estate capable of being lawfully bequeathed by will for charitable purposes, and whether the 4000*l.* Metropolitan Consolidated 3*l.* 10*s.* per cent. Stock was personal estate not capable of being lawfully bequeathed by will for charitable purposes either under the Act 9 Geo. 2, c. 36, or the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

Upon the first question the case of *In re Bridger* (1) was referred to as an authority to shew that the testator, having died subsequently to, though his will was made before, the passing of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), the whole of the residuary estate was devoted to the charitable purpose mentioned in the will; but his Lordship held, upon the construction of the will, that this was not so, and that such part only of the testator's residuary estate was

a period of not less than two months after demand in writing in the payment of dividend on such stock or of interest on any such security, apply to the Court of Chancery in a summary way for the appointment of a receiver, and the Court of Chancery may, if the Court think fit, on such application appoint a receiver on such terms and conditions, and with such powers, as the Court think fit. Such person shall have the same power of collecting and receiving and applying all moneys liable to be carried under this Act to the Consolidated Loans Fund, and of assessing and raising the metropolitan consolidated rate for the purpose of obtaining such moneys as the Board or any officer thereof may have, and shall apply all such moneys, after payment of expenses and costs, under the direction of the Court, for the purposes of and in conformity with this Act. The Court may at any time discharge such receiver, and shall have full jurisdiction over such receiver, and the applicant and all persons and bodies interested in the acts of the receiver, in the same manner and to the same extent as if a suit had been duly instituted for the administration of the affairs of the Board and a receiver had been appointed in such suit."

(1) [1893] 1 Ch. 44; [1894] 1 Ch. 297.

applicable for the charitable purpose as was at the time of his death pure personal estate. The question whether the 4000*l.* Metropolitan Consolidated 3*l.* 10*s.* per cent. Stock was pure or impure personalty was then argued.

Crawley, for the plaintiffs, the executors and trustees, stated the question.

Warrington, Q.C., and *Mark L. Romer*, for the charity. The Metropolitan Consolidated 3½ per cent. Stock is pure personalty. The holders of it have no interest in land within the meaning of the Mortmain Act, 9 Geo. 2, c. 36, s. 3, or the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (iii.). We are aware that in *Cluff* v. *Cluff* (1) Hall V.-C. is reported to have held that this very stock was impure personalty, but no argument was addressed to the Court in that case on behalf of the charities interested, and the case, therefore, cannot be regarded as a decision; and it is submitted that in view of *Attree* v. *Hawe* (2) (where a decision of Hall V.-C. was reversed on appeal) and *In re Pickard* (3) it must be held that this stock is not a charge on specific land, but merely on the general undertaking of the London County Council (as successors to the Metropolitan Board of Works), just as in *In re Pickard* (3) the Leeds Corporation Debenture Stock, though charged in terms on the revenues of all the landed and other property of the corporation, was held to be a mere charge on the undertaking of the corporation, and therefore not an interest in land. The test to be applied is whether there is a definite charge on specific land, or only a general charge on an undertaking which includes land. Under the Act of 32 & 33 Vict. c. 102, this stock is merely a charge on the undertaking. The Act contains provisions for redemption out of a fund which does not include land, but only money arising from land. No remedy by foreclosure or sale is available, but the only remedy is by the appointment of a receiver, who can collect and apply moneys which are to go into the Consolidated Loans Fund. No doubt there is a charge on the land in terms,

(1) (1876) 2 Ch. D. 222. (2) (1878) 9 Ch. D. 337.
(3) [1894] 2 Ch. 88; 3 Ch. 704.

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but it is a charge under which the holder of the stock can never get an interest in the land, because he cannot enforce his charge against the land directly.

There is no substantial difference in character between this stock and the railway debenture stock which was the subject of decision in *Attree* v. *Hawe*. (1) The case of *In re Holmes* (2) may be cited as an authority against us, and to some extent it is so; but if the test to be applied here is that which Kay J. applied in that case, namely, whether the holder of the stock can or can not get hold of any part of the land, it is clear that in this case he cannot. It is submitted, however, that the true test is that already stated. In *Attree* v. *Hawe* (1) James L.J. said this: "It is difficult to conceive how this"—i.e., the appointment of a receiver—"could, directly or indirectly, tend to make any land inalienable or to give to the stockholder, either immediately or as the ultimate result of any amount of insolvency, the possession or the right to the possession of any portion of the property of the company, which must remain legally and equitably in the possession of the company and under the absolute control and dominion of the statutory body of managers." Every word of that passage applies to the present case.

Ingle Joyce, for the Attorney-General.

Renshaw, *Q.C.*, and *R. B. Yardley*, for the persons entitled to the residue. The fallacy of the argument on the other side is that it fails to attribute any meaning to the word "charge" in s. 5 of the Act 32 & 33 Vict. c. 102. That word must have some meaning given to it. Granting that the test is whether there is a definite charge on specific land, we contend that in the present case that test is satisfied, because the land is specifically charged. *Cluff* v. *Cluff* (3) and *In re Holmes* (2) are direct authorities in our favour, and *In re Holmes* (2) was recognised as an authority in the case of *In re Pickard*. (4) In the case of *In re David* (5), the Court of Appeal held that bonds constituting a charge on bridge tolls conferred an interest

(1) 9 Ch. D. 337, 350.
(2) (1890) 60 L. J. (Ch.) 267; 63 L. T. (N.S.) 477.
(3) 2 Ch. D. 222.
(4) [1894] 2 Ch. 88; 3 Ch. 704.
(5) (1889) 43 Ch. D. 27.

in land. The expression "undertaking" is vague. The London County Council has no doubt several undertakings, but it is also the owner of landed property comprising public parks; there is no one concern which can be appropriately described as the "undertaking" of the London County Council. In *In re Pickard* (1) there was not a charge on the land of the corporation, as there is in the present case, but on the "revenues" of the land, and the Court of Appeal relied on the use of that expression as pointing, to use the words of Davey L.J., rather to the revenue in the hands of the corporation than to the rents payable by the tenants for the specific use of the property.

[KEKEWICH J. referred to the case of *In re Hallett* (2), where mortgage debenture stock of the corporation of Leicester was held by North J. to be impure personalty.]

Warrington, Q.C., in reply. The report of that case does not appear to be satisfactory, for the decision as reported is inconsistent with the decision of the same judge in *In re Pickard* (1), and it does not appear what were the provisions of the Act of Parliament there as to the appointment of a receiver, or payment to a sinking fund.

KEKEWICH J. If I were at liberty to decide this case entirely according to my own view, I should not have the slightest hesitation in saying that this is not an interest in land within the meaning of the Mortmain Acts. It seems to me that there is some absurdity in saying that a man who invests his money in corporation stock, the security for the interest of which consists to some extent of land, has an interest in land. A man who invests in that way does not look to the land, he does not take a charge on the land in express words by virtue of any instrument, he cannot enforce his rights by foreclosure or sale, and, in common parlance, he does not dream of having an interest in land. But I have to consider the bead-roll of decided cases, to several of which counsel have referred. Certainly the tendency of the decisions in modern times, quite irrespectively of the two Acts of 1888 and 1891, is to take out of the mischief of the Mortmain Act (9 Geo. 2, c. 36) much

(1) [1894] 2 Ch. 88; 3 Ch. 704. (2) (1889) 5 Times L. R. 285.

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that was held to be within it before; but there are a certain number of decided cases which remain unaffected by recent authorities. *Attree* v. *Hawe* (1) is an extremely valuable authority on all questions of this kind, because the whole law was thoroughly considered in a strongly constituted Court of Appeal, consisting of the late Master of the Rolls, Sir George Jessel, and the late Lords Justices James, Baggallay, and Bramwell; but it must not be forgotten that the decision in that case was with reference to debenture stock under the provisions of the Companies Clauses Act, 1863, which is substantially in the same position as debentures issued under the Companies Clauses Consolidation Act, 1845. Reference was there made, as in other cases, to *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) I venture to think that that case has been much misunderstood with reference to this branch of the law. The real meaning of that case in reference to this branch of the law is to be found in two or three words of Davey L.J. in *In re Pickard* (3), where he says: "They"—i.e. Turner L.J. and Lord Cairns in *Gardner* v. *London, Chatham and Dover Ry. Co.* (2)—"in substance said this: Whatever may be the words used, it is a charge only on the fruits of the undertaking." And that is in effect precisely what Lord Cairns said in his celebrated judgment in *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) as to the fruit-bearing tree. When once that is grasped, all the comments on the meaning of the word "undertaking" and the phrase "charge on the undertaking," supported by reference to *Gardner* v. *London, Chatham and Dover Ry. Co.* (2), fall to the ground, because what was held to be charged was not the undertaking, including the land as part of the undertaking, but the fruits of the undertaking. There was no charge on the land, and in fact *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) is a distinct decision that the debentures were not a charge on the surplus land. *Attree* v. *Hawe* (1), therefore, dealing as it does with debenture stock, is not of so much value as it otherwise might be. Here I am dealing, not with the debenture stock of a trading corporation,

(1) 9 Ch. D. 337. (2) (1867) L. R. 2 Ch. 201.
(3) [1894] 3 Ch. 704, 715.

but with the stock of a municipal body created under the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102). There is a distinct charge on the land, and Mr. Warrington's argument comes to this, that the question is one of words. The Act says that there is a charge on the land, but it is a charge on the land which is not to be enforceable in the way in which charges on land are generally enforced. The word "charge," as he says, is only used by way of expressing the rights of the stockholder, which he cannot enforce by obtaining any interest in the land. I do not hesitate to say that I could wish to hold that to be sound, because I do not believe that the interest of the holder of this stock, if it be an interest in land, really falls within the mischief intended to be met by the Mortmain Act; but I feel myself constrained by the authorities. In the first place, Hall V.-C., in the case of *Cluff* v. *Cluff* (1), distinctly held that two bequests of 3500*l.* of this very stock to the Freemasons' charities were of impure personalty and therefore void. The case ought not to have been reported, because there was no argument; nor, so far as I can make out, was there any one there to argue on behalf of the Freemasons' charities. I suppose that the learned judge and the learned counsel thought that the point was one not worth serious argument, and therefore the charities were not served; or it may be that the charities had an opportunity of appearing, and did not think fit to appear. It is an unsatisfactory decision; but it is an expression of judicial opinion, and I find it thus cited in the 3rd edition of Tudor's Charitable Trusts, at p. 409: "It has also been held that Metropolitan Board of Works Consolidated Stock cannot be bequeathed to charity: *Cluff* v. *Cluff*" (1); so that the case has found its way into the text-books, and is to be regarded as of some authority. I do not think I could decline to follow that unless I were satisfied that it was wrong, and that there were other decisions inconsistent with it. But I turn to the decision of Kay L.J., then Kay J., in *In re Holmes*. (2) It is not precisely the same case; but still I think the substance of his judgment is in accordance with that of Hall V.-C. in the other case. *Attree* v. *Hawe* (3) and *Gardner* v.

(1) 2 Ch. D. 222. (2) 60 L. J. (Ch.) 267; 63 L. T. (N.S.) 477.
(3) 9 Ch. D. 337.

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London, Chatham and Dover Ry. Co. (1) were cited to Kay J., but he did not proceed upon either of those cases, but on the principle that there was a charge on the land. That case seems to me to be opposed to the view which I am asked to take—that this sum of stock is pure personalty. Then, besides that, I have the case of *In re Hallett* (2), before North J. I confess that as that case is stated in the Times Law Reports it seems to be inconsistent with the decision of North J. himself affirmed by the Court of Appeal in *In re Pickard* (3); but there the stock in question was Leicester Corporation 3½ per cent. Redeemable Stock, apparently not being a direct charge on land except as being the property of a corporation, and North J. held that he was bound by numerous decided cases to hold that it was a charge on the land. The matter, therefore, comes to this. Here there is a charge on the land, and the authorities, without going further into them, seem to me to say that a charge on the land brings a case within the mischief of the Mortmain Acts. Therefore I think I must hold that this sum of Metropolitan Consolidated Stock has not been given to the charity.

Solicitors: *H. & G. Keith; Lewin & Co.; Solicitor to the Treasury.*

(1) L. R. 2 Ch. 201. (2) 5 Times L. R. 285.
(3) [1894] 2 Ch. 88; 3 Ch. 704.

C. C. M. D.

RAFFETY *v.* SCHOFIELD.

ROMER J.

1897

[1897 R. 207.]

March 2, 3; *April* 6.

Landlord and Tenant—Building Agreement—Option to Purchase—Interest of Tenant after Exercise of Option—Breach of Conditions—Power of Landlord to Determine.

By a building agreement the defendant agreed to erect certain buildings, and carry out certain works, on the plaintiff's land within a specified time, and "forthwith to proceed" with and complete the works, when a lease for ninety-nine years was to be granted; the agreement provided that if the defendant did not perform the several stipulations therein contained, the plaintiff might by notice in writing determine the agreement and re-enter; it also contained an option to the defendant to purchase the freehold. The plaintiff being dissatisfied with the slow progress made by the defendant, gave him notice to determine the agreement; but the defendant having previously given notice to the plaintiff of his intention to exercise the option to purchase, declined to give up possession. On an action by the plaintiff to restrain the defendant from trespassing on or interfering with the plaintiff's possession of the land:—

Held, on the evidence, that the defendant had made default in not "forthwith proceeding" to carry out the stipulations of the agreement; but that as there was no condition precedent that the defendant should not have committed any breach of the conditions contained in the building agreement, the option to purchase was well exercised, and a binding contract was thereby made for the sale and purchase of the property; that the determination of the leasing part of the building agreement by the notice given to the defendant for breach of its conditions, did not destroy or affect the contract for sale created by the exercise of the option to purchase; and that the plaintiff's action must therefore be dismissed.

The rights and position of a purchaser in the interval between the commencement of the contract and the completion of the purchase discussed.

ACTION.

By a building agreement of August 12, 1895, the plaintiff (therein referred to as the landlord) agreed, in the event of certain buildings and works therein mentioned being completed and carried out as therein provided, to demise to the defendant (therein referred to as the tenant) certain premises in St. Mary Abbotts, Kensington, for a term of ninety-nine years from September 29, 1895, at a rent after the first year of 67*l.*, payable on the usual quarter-days.

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The agreement was in the usual form; the only portions of it material for the purposes of this report were as follows:—

3. "The tenant shall forthwith proceed with the works, and will on or before the 1st of May, 1896, erect and cover in" the buildings, "and completely finish the same fit for occupation on or before the 1st of June, 1896," and "expend not less than the sum of 20,000*l*."

13. "Until the said premises shall have been actually demised, the tenant shall pay to the landlord the said rent hereby agreed to be reserved, and will perform and observe all the stipulations and agreements on the part of the tenant which are contained in these presents," and in a draft lease which had been signed by the parties, and that "in case of any breach being made" in payment of the rent thereby agreed to be reserved, it should be lawful for the landlord to distrain.

15. "Provided that in case the tenant shall not at the respective times and in manner hereinbefore expressed in this behalf have built and fully completed" the premises "hereinbefore agreed to be built on the land hereby agreed to be demised, or in case the tenant shall for the space of twenty-eight days next after the rent payable for the said piece of land, or any portion of such rent shall have become payable, make default in the payment thereof, or if the tenant shall not perform and observe the several stipulations and agreements on his part herein contained, then and in any or either of the said cases it shall be lawful for the landlord, by some writing signed by him and given to or left for the tenant at his usual or last known place of abode or business in England, to determine and put an end to this present agreement," and re-enter and be entitled to any incomplete buildings or plant, machinery, or materials that might be found upon the said land without any payment for the same.

17. "If the tenant shall be desirous of purchasing the fee simple free from incumbrances (except these presents) of the said piece of land and premises at the price of 16,000*l*., and shall at any time before the 9th of August, 1897, give to the landlord or leave for him at his usual or last known place of abode in England a notice in writing to that effect, then and in

such case the persons giving or leaving such notice shall be deemed the purchaser of the premises at the price of 16,000*l.* as from the date of such notice, subject to the following conditions," which, so far as material, were as follows: (1.) The purchase was to be completed on the quarter-day that happened next after the expiration of three months from the serving of such notice. (2.) The purchaser was to pay all arrears of rent up to the day appointed for completion, including the quarter's rent due on that day. (11.) That if the purchaser should take any objection or make any requisition which the vendor should be unable or unwilling to remove or comply with, the vendor might "rescind this agreement for sale."

On December 30, 1896, the defendant served upon the plaintiff a notice of his intention to exercise the option of purchase given him by clause 17.

It appeared that the plaintiff had been dissatisfied from the first with the slow progress made by the defendant in carrying out the proposed new buildings and works, and on January 27, 1897, he served a notice on the defendant purporting to determine the said building agreement under the provisions of clause 15, and stating that it was his intention to re-enter forthwith. Two grounds of default were alleged: first, that the buildings had not been completed in the time named; but it appeared from the evidence that the defendant had applied for and obtained from the London County Council an extension of time till October 27, 1897, and that there had been a collateral and contemporaneous verbal agreement between the parties upon this subject, as stated in the judgment. The second ground was that the defendant had not forthwith proceeded with the works within the fair meaning of these words as used in clause 3.

As the defendant declined to give up possession, the present action was commenced, claiming an injunction to restrain the defendant from trespassing upon or interfering with the possession by the plaintiff of the said land and premises.

The action was set down in the witness list without pleadings upon agreed issues, the main question argued being the effect of the exercise of the option to purchase upon the building

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agreement. The result of the evidence upon the question of default by the defendant in performing the agreement is sufficiently stated in the judgment.

Farwell, Q.C., and *A. a'B. Terrell*, for the plaintiff. There has been a breach of the conditions contained in the agreement, and the plaintiff now has a right to determine the tenancy under the provisions of clause 15. This notice puts an end to the whole agreement, and thereupon the option to purchase no longer exists. The mere exercise of the option to purchase cannot put an end to the leasing parts of the building agreement; that could only be done when the purchase was completed.

Levett, Q.C., and *George Lawrence*, for the defendant. There is no condition precedent here that the defendant must have observed all the conditions of the agreement before he exercised the option to purchase; the option therefore has been validly exercised, and by its exercise the relationship of vendor and purchaser is set up between the parties. The building agreement and the subsequent clauses governing the option to purchase are two distinct documents. Paragraph 17, when the option is exercised, is a complete agreement for sale, and has nothing to do with the rest of the building agreement. As from the date of the notice the defendant became the purchaser, and thenceforth the agreement became one as between vendor and purchaser; a vendor cannot bring an action against a purchaser to restrain him from continuing in possession when he happened to be in possession at the date of the contract for purchase.

Farwell, in reply. Assuming there has been a breach of the conditions by the defendant, then the plaintiff's notice is good, and the agreement is at an end, and with it the defendant's right to possession; the defendant is not a purchaser until completion. Suppose we gave him notice to rescind because he persisted in some requisition, then the contract would be at an end; until completion the vendor is master of the situation.

Cur. adv. vult.

April 6. ROMER J. This action gives rise to points of some difficulty and is of importance to the parties. From the evidence before me it appears that the property is worth considerably more than the purchase-money payable by the defendant, and, if the plaintiff's contention be correct, the defendant will lose not only the benefit of his bargain, but also all the money that he has already paid to the plaintiff and that he has otherwise expended in reference to the property. On the other hand, it is suggested on the plaintiff's behalf that if the defendant does not complete the purchase the property will be deteriorated in value by the buildings contemplated by the agreement not being completed within the time limited. But, having regard to the value of the property, it does not appear to me very probable that the defendant will fail to complete.

The first question is whether the defendant has made such default as would entitle the plaintiff, if the option of purchase had not been exercised, to determine the agreement under clause 15. It was contended on the plaintiff's behalf that the defendant had committed default in not completing the buildings by the time limited by clause 3. But it was proved to my satisfaction that there was a collateral contemporaneous agreement that the dates mentioned in clause 3 should be postponed if an extension of time could be obtained from the London County Council for the completion of the buildings by the amount of such extension. A large extension was so obtained, and the times for covering in and finally completing the buildings under the original and collateral agreements have in consequence not yet expired. So no default has arisen in this respect. But the other default relied on by the plaintiff occasions more difficulty. It appears that beyond pulling down some erections on the site, and stacking the bricks ready to be used for the new building, and paying one or two men to keep possession of and look after the premises, the defendant has not substantially done anything to carry out the works mentioned in the agreement. It seems to me that under these circumstances, and looking at the agreement as a whole, I cannot say that the defendant did "forthwith proceed with the works" within the fair meaning of those words as used in clause 3. And, in

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coming to this conclusion, I bear in mind that the agreement does not provide for or require that the works should be continuously proceeded with. But I think it did require some building to be forthwith proceeded with—something more, at any rate, than what the defendant has done. I therefore come to the conclusion that in this respect there was default on the defendant's part, and that consequently he did not "perform and observe the several stipulations and agreements on his part" within the meaning of those words as used in clause 15. This conclusion renders it necessary for me to consider the effect of the exercise by the defendant of the option of purchase given to him by clause 17. Now, it clearly was not a condition precedent to the exercise of the option that the defendant should not have made default under the building agreement; so that the option was well exercised, and a binding contract was thereby come to between plaintiff and defendant for sale and purchase of the property. But I agree with the plaintiff's arguments so far that that contract did not in itself before completion put an end to what I may call the leasing parts of the building agreement. I come to that conclusion from a general consideration of the building agreement, and in particular of the provisions of clause 17, that the tenant was to buy "free from incumbrances (except these presents)." And of course the contract of purchase might not be completed, and that from no fault of the purchaser; for it might (by way of example) be put an end to by the vendor under the provision of clause 17 that if the purchaser made any requisition that the vendor was unable or unwilling to remove or comply with the latter might rescind the sale; and it could not be within the contemplation of the building agreement that in such a case the purchaser should not only lose his purchase bargain but also find himself deprived of all his rights under the other parts of the agreement.

But on the other hand, though the contract of purchase did not in itself destroy the leasing parts of the agreement, it created fresh rights and liabilities between the parties, and a new relation between them, namely, that of vendor and purchaser. It was in fact a new and distinct contract from that created by the building agreement, though it arose by reason of and

flowed from the building agreement. And even assuming that notwithstanding the purchase contract the rest of the building agreement stood, including the power to determine under clause 15, I see no sufficient reason for holding that the determination of the building agreement under the power would in itself destroy or affect the contract for sale, which (as I have pointed out) was a new and distinct contract from that created by the building agreement. The wording of the power in clause 15 which enabled the landlord to determine "this present agreement" is not appropriate if attempted to be applied to the contract of purchase. The last-named contract was not "this present agreement," or even part of it, though flowing from it. And even assuming that the plaintiff has by his notice to determine put an end to the defendant's rights, so far as they arise directly from the building agreement, I think the plaintiff has not thereby put an end to the contract of sale or to the defendant's rights thereunder. Now, on the evidence it is clear that the defendant has throughout remained and is still in possession of the property, and I find that on completion under the second condition in clause 17 he will have to pay to the plaintiff all arrears of rent up to that date; and under these circumstances I think I ought not, even on the above assumption, to order him to retire from possession before the date fixed for completion arrives. I think it was contemplated by the agreement that after exercising his option of purchase the defendant should remain in possession until completion, and should then pay, with his purchase-money, rent for the interim possession, and with that possession I think I ought not to interfere. I may add that no question arises here as to rent accruing due before the option was exercised, for no such rent remains owing.

But there is another consideration which also induces me to hold that the plaintiff ought to fail in this action. After the relation of vendor and purchaser was established between the parties, the purchaser was in equity the owner of the property. And the position of the vendor is clearly stated by Lord Cairns in *Shaw* v. *Foster* (1) as follows: "Under these circumstances

(1) (1872) L. R. 5 H. L. 321, 338.

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I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

Now, in the case before me I cannot see that any paramount right of the vendor to protect his own interest as vendor requires or entitles him to determine the defendant's occupation or his interests under the building agreement, even assuming that the defendent is occupying the property not as purchaser, but as a quasi-tenant under the building agreement. This is not a case where the vendor has rights in respect of the defendant's occupation which are apart and separate from the rights of the purchaser or require separate protection. As I have pointed out, no rent remains owing to the vendor in respect of the occupation of the property prior to the exercise of the option of purchase, and the subsequent rent is expressly provided for by the contract of sale. The question of the defendant's occupation, therefore, that is to say, whether it is better or not that that occupation should be determined, is one which only concerns the property sold and its value, and that property is in equity the defendant's, and he is entitled to say that he desires the existing position of the property and its occupation not to be disturbed pending completion. Suppose that the occupier had not been the purchaser, and had been an ordinary tenant existing at the date of the contract. The purchaser would have been entitled to say to the vendor that he did not desire the tenancy to be determined. As between vendor and purchaser of a property which at the date of the contract is in occupation of a tenant, the purchaser is generally

speaking entitled to have the property preserved pending completion in its existing state, and the vendor would not only not be entitled as against the purchaser's desire to determine the tenancy, but if he did determine it he would be liable to the purchaser for any loss thereby accruing. This has always, I think, been the general view of the profession, and is certainly implied in the case of *Harford* v. *Purrier*. (1) In fact, as between vendor and purchaser generally the powers of the vendor to act as owner of the property, and (inter alia) to change tenants or holdings, are suspended pending completion of the purchase. And I think I ought to hold in the case before me that, after the exercise by the defendant of the option of purchase and pending completion, the power of the plaintiff, if any, to determine the defendant's occupation and the defendant's rights and liabilities under the building agreement became as between plaintiff and defendant suspended and not enforceable, at any rate not enforceable under the circumstances of the case established before me. The action, therefore, fails, and must be dismissed with costs.

Solicitors: *Fladgate & Co.; Parker & Thomas.*

(1) (1816) 1 Madd. 532.

W. C. D.

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1897
April 27.

In re MARQUIS OF BRISTOL.
EARL GREY *v.* GREY.

[1897 B. 1136.]

Settlement—Hotchpot—Two Funds—Referential Trusts.

A marriage settlement dealt with two funds: 13,000*l.* Consols belonging to the wife, and a policy for 5000*l.* on the life of the husband. The capital of the wife's fund was to go to such children of the marriage as the husband and wife by deed, or the survivor by deed or will, should appoint, and in default of appointment to the children equally, subject to a hotchpot clause in the form usually adopted in the case of one fund: the 5000*l.* policy moneys were to go to such children of the marriage as the wife should by deed or will appoint, and in default of appointment "upon the same or the like trusts," and subject to "the same or the like" powers and provisoes as were expressed in the said settlement concerning the wife's fund after the death of the husband and wife and in default of appointment. The whole of the 13,000*l.* had been appointed unequally among the three children of the marriage, the 5000*l.* was unappointed, and the question now raised was whether the two sums were to be aggregated for the purposes of hotchpot, or whether the 5000*l.* was divisible into three equal shares:—

Held, that the two funds were distinct, and that the three children were entitled to the 5000*l.* in equal shares, without having to account for or bring into hotchpot any sums appointed to them out of the 13,000*l.*

Adjourned Summons.

By a marriage settlement of June, 1836, a sum of 13,000*l.* Consols was settled by the father of the intended wife upon the usual trusts, after providing for the payment of the premiums on a policy of 5000*l.* on the life of the intended husband, to pay the income to the husband and wife during their respective lives, and, after the death of the survivor, upon trust for the children of the marriage in such shares and proportions as the husband and wife by deed, or the survivor by deed or will should appoint, and in default of appointment to the children equally, "but no child taking under any appointment to be made in exercise of the power or powers hereinbefore contained shall be entitled to any unappointed part of the said sum of 13,000*l.*" Consols, "or of the stocks, funds, or securities in or upon which the same may be invested without bringing his or

her appointed share or shares into hotchpot and accounting for the same accordingly." The ultimate trusts in default of children were in the usual form, and in favour of the wife and her next of kin to the exclusion of the husband. A policy for 5000*l.* on the life of the intended husband was also settled, upon trust to pay the income to the wife for her life, and, after her death, upon trust for the children of the marriage in such shares and proportions as the wife should by deed or will appoint; and, in default of such appointment, "then upon such and the same or the like trusts, for such and the same or the like intents and purposes, and with, under, and subject to the same or the like powers, provisoes, and agreements as are hereinbefore mentioned, expressed, and declared of and concerning the said sum of 13,000*l.* Consols from and after the decease of the survivor of them, the said" husband and wife, "and in default of appointment by them and the survivor of them as aforesaid," except that the ultimate trust, in the event of there being no children of the marriage, was to be for the benefit of the husband, his executors, administrators and assigns absolutely.

There were three children of the marriage. The wife died in 1869, without having exercised either jointly or separately either power of appointment.

In November, 1895, the husband died, having appointed the whole of the 13,000*l.* Consols in unequal proportions among the three children. The 5000*l.* was unappointed, and the question now presented to the Court by the trustees of the settlement was whether the two funds were to be aggregated for the purposes of hotchpot, or the 5000*l.* was divisible into three equal shares among the three children.

R. Younger, for the trustees of the settlement.

Vaughan Hawkins, for a child to whom 1000*l.* only had been appointed. The primâ facie rule for construing referential trusts is to read them as extending to and governing the second fund, just as if the two funds had in the first instance been settled. A direction that fund B shall be held on the trusts already declared of fund A, the trustees being the same, does

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not mean that there are to be two distinct sets of trusts. The effect of the whole instrument must be considered: *Hindle* v. *Taylor* (1); *Trew* v. *Perpetual Trustee Co.* (2); there is no duplication of charges in the present case. A general hotchpot applicable to three funds was created by reference in *In re Perkins*. (3) The object of the hotchpot clause is to produce equality, and if these two funds are not aggregated one child will have a very much larger share in the settled funds than the others. [*Montague* v. *Montague* (4) and Davidson's Conveyancing, 3rd ed. vol. iii. p. 171, were also referred to.]

P. S. Stokes, for another child to whom the bulk of the 13,000*l.* had been appointed, was not called on.

ROMER J. I do not see my way to hold that the funds settled by this settlement, the 13,000*l.* and the policy moneys, are to be regarded, or can be regarded, as one for the purpose of the hotchpot clause. Clearly I could not hold that the trusts of the 5000*l.* in default of appointment are to be governed by reference to the appointments of the 13,000*l.*, if I did not also hold, on the other hand, that the trusts of the 13,000*l.* in default of appointment must be governed by reference to what was done with regard to the 5000*l.* Now the trusts of the 13,000*l.* are themselves very clear, and this is a case of a deed, and not a case of a will, and it appears to me it would be a very strong thing indeed to say that I can alter the trusts of the 13,000*l.* by reason of the subsequent trusts as to the 5000*l.* The fact is that in this settlement the two funds are really quite distinct. The sources from which they come are different. The trusts of the two funds are essentially different, and the ultimate trusts in default of children are especially and of necessity different. I cannot help thinking that when reference is made, in dealing with the policy moneys, to the 13,000*l.* trusts, as to what is to happen with the fund in default of appointment, when the children take, the trusts of the 5000*l.* are only expressed in a short form by reference to the 13,000*l.* in order to save the necessity of repeating them, and not with an intent

(1) (1855) 5 D. M. & G. 577.
(2) [1895] A. C. 264.
(3) (1892) 41 W. R. 170.
(4) (1852) 15 Beav. 565.

to aggregate for the purposes of the settlement the two funds, and as it were to make them one.

The cases which have been cited do not enable me, and would not entitle me to deal with these two funds as one for the purpose of the hotchpot clause. *Hindle* v. *Taylor* (1) was a case of a will, and of a will dealing with charges, and so was the case of *Trew* v. *Perpetual Trustee Co.* (2) The principle of those cases is I think well set forth, if I may say so, by Lord Hobhouse in his judgment. (3) He shews that the cases he was dealing with were cases referring to charges or matters in the nature of charges. He says this: "But in the first place their Lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate or trusts in the nature of charges. Of course such may be the intention or effect of a particular will. But in the absence of anything in the will to shew such an intention, the rule is that the Court will not impute it to the testator." I quite agree as a general proposition that where in a will you have trusts declared of one property with reference to the trusts that are previously or subsequently declared of another property, then, in construing the will, you will, so far as possible, treat the two funds as identical, at any rate for the purposes of not multiplying charges or trusts in the nature of charges; but I think the proposition must be limited to that. No case that has been cited before me refers to a case of a hotchpot clause except one, and that is the case before North J. of *In re Perkins* (4), and was the case of a will. There North J. came to the conclusion that what the testator had done was in effect for all purposes to make three funds, though separately referred to, one for the purposes of the will. The trusts in that case of the three funds were to be identical.

Now, in the case before me the trusts with reference to the 5000*l.* so far as material are not the same as those upon which the 13,000*l.* was to be held, but "such and the same or the like" trusts, and subject to "the same or like powers,

(1) 5 D. M. & G. 577.
(2) [1895] A. C. 264.
(3) [1895] A. C. 268.
(4) 41 W. R. 170.

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provisoes, and agreements." As I have already said, I cannot gather from this deed that there was any intention that, for the purpose of the settlement, the two funds were to be treated as one fund. So that the case before North J. does not apply to the case now before me. Really the case now before me is much more like the case of two funds declared by two separate deeds where the second deed declares the trusts of the second fund by reference to the first. In fact, it is more like the case of *Montague* v. *Montague*. (1) For these reasons I hold that the two funds must be treated as distinct for the purpose of the provisions of the hotchpot clause, and consequently that the three children will take the 5000*l*. in equal shares.

Solicitors: *Philip Thornton, for C. D. Forster & Co., Newcastle-upon-Tyne; T. W. Mitchell.*

(1) 15 Beav. 565.

W. C. D.

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A testator died insolvent after 1870 owing specialty and simple contract debts, including a simple contract debt to the Crown. The assets were more than sufficient for payment of the Crown debt after satisfying the specialty debts:—

Held, having regard to 32 & 33 Vict. c. 46, that the assets ought first to be apportioned rateably between the specialty and simple contract debts, and that the Crown debt ought then to be taken out of the amount apportioned to the simple contract debts.

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should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person, was secured by deed of covenant. The estate of the covenantor was insufficient for payment of the annuity in full, and, in an administration action, the annuity was valued, and was represented by a fund in court:—
Held, that the whole fund ought to be paid to the annuitant.
Carr v. *Ingleby*, (1831) 1 De G. & Sm. 362, not followed. *In re* Sinclair. Allen *v.* Sinclair. Hodgkins *v.* Sinclair **Kekewich J. 921**

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CANAL—*Right to Support—Subjacent and Adjacent Minerals—Working—Undertaking not to Sue.*

The defendants' canal was constructed under an Act of Parliament by which the canal was to be open for use by the public on payment of tolls. Two sections of the Act (37 and 38) were identical in effect with the statutory provisions construed by the House of Lords in *Knowles & Sons* v. *Lancashire and Yorkshire Ry. Co.*, (1889) 14 App. Cas. 248, and *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A. C. 564.

By s. 37 nothing therein contained was to affect the right of any owner of land to the mines and minerals under the lands to be made use of for the canal, but it should be lawful for him to work the same, not thereby injuring, prejudicing or obstructing the canal.

By s. 38, if the mine-owner should in pursuing the mines work near or under the canal so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the mine-owner to endanger or damage the further working thereof, it should be lawful for the company to treat and agree with the mine-owner for all

CANAL—*continued.*
minerals near or under the canal which should be thought proper to be left for the security of the canal or mines, and in case of disagreement, then, upon the request of either the company or the mine-owner, the amount of satisfaction should be assessed, and upon payment thereof the mine-owner should be perpetually restrained from working the mines within the limits for which satisfaction should be given.

Plaintiffs were the owners of coal-mines under the canal and the lands on both sides of it, and, being advised that if they continued their workings within certain limits on both sides of the canal they would damage it, they gave the defendants (who had succeeded to the rights and obligations of the canal company) notice of their intention to work the subjacent and adjacent coal, and requiring them to treat for the coal necessary to be left for the security of the canal. The defendants replied that no coal need be left, and declined to treat.

Plaintiffs then sued defendants for—(*a*) a declaration that they were entitled to work all their adjacent coal, although the result might be to endanger or damage the canal, or, in the alternative, (*b*) a declaration that plaintiffs were entitled to be paid, under s. 38, satisfaction for adjacent coal left as canal protection. Plaintiffs also claimed a declaration that under ss. 37 and 38 they were entitled to be paid satisfaction for the subjacent coal left as protection:—

Held, that the plaintiffs were entitled to declaration (*a*), but that on the plaintiffs and defendants making admissions (substantially to the effect of the referee's findings in the *Chamber Colliery Case*, see [1894] 2 Q. B. 635) that the cost, if any, of repairing damages to be sustained to the canal and works by getting all the coal would be trifling compared with the value of the coal required to be left for the absolute protection of the canal and works, and that such damage could be repaired from time to time, and would not interfere with the navigation, and on the defendants undertaking (substantially in accord with the undertaking required by the Court of Appeal in the *Chamber Colliery Case*, [1894] 2 Q. B. 632, 642) not to claim damages in the future in respect of the plaintiffs working the subjacent coal, and at their own expense to repair any damage thereby caused, the plaintiffs were not entitled to any declaration respecting the subjacent coal. NEW MOSS COLLIERY COMPANY *v.* MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY - - **Byrne J. 725**

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—— *Craig* v. *Wheeler,* (1860) 29 L. J. (Ch.) 374, approved and followed - - 881
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—— *Hole* v. *Bradbury,* (1879) 12 Ch. D. 886, applicable - - - - 21
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—— *Lancaster* v. *Eve,* (1859) 5 C. B. (N.S.) 717, distinguished - - - 182
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—— *Lee* v. *Pain,* (1844) 4 Hare, 201, 249, commented on and distinguished - 75
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—— *Lever* v. *Goodwin,* (1887) 36 Ch. D. 1; 4 Rep. Pat. Cas. 492, form in, followed - 893
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—— *Lockhart* v. *Reilly,* (1856) 25 L. J. (Ch.) 697, followed - - - - 536
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—— *Paine* v. *Jones,* (1874) L. R. 18 Eq. 320, explained and distinguished - 440
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—— *Pulbrook* v. *Ashby,* (1887) 56 L. J. (Q.B.) 376, explained and approved - 373
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—— *Reddaway* v. *Banham,* [1896] A. C. 199, discussed - - - - 893
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—— *Stevens* v. *Benning*, (1854) 1 K. & J. 168, applicable - - - - 21
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—— *Wearing* v. *Wearing*, (1856) 23 Beav. 99, commented on - - - 881
See WILL. 1.

—— *Welch* v. *National Cycle Co.*, W. N. (1886) 97, Palmer's Company Precedents, 6th ed. Part I. p. 909, considered - 511
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—— *Williams' Estate, In re*, (1872) L. R. 15 Eq. 270, distinguished - - - 673
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—— *Wilson* v. *Coxwell*, (1883) 23 Ch. D. 764, principle of, applied - - 673
See ADMINISTRATION.

—— *Wood* v. *Hewett*, (1846) 8 Q. B. 913, distinguished - - - - 182
See FIXTURES.

—— *Woodhouse* v. *Walker*, (1880) 5 Q. B. D. 404, followed - - - - 694
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—— *Wright's Trusts, In re*, (1883) 24 Ch. D. 662, followed - - - - 256
See SETTLED LAND. 4.

CHARGE — Making up street — Recovery of expenses — - - - 843
See NATIONAL SCHOOL.

CHARITY—*Mortmain—Interest in Land—Pure or Impure Personalty.*

Metropolitan Consolidated 3½ per cent. Stock, issued under the Metropolitan Board of Works (Loans) Act, 1869, held to be impure personalty, as conferring on the holders an interest in land within the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (iii.) *In re* CROSSLEY. BIRRELL *v.* GREENHOUGH
Kekewich J. 928

2. —— *Will—Bequest of Trust Funds to be applied "in Grants for or towards the Purchase of Advowsons or Presentations."*

A bequest to trustees to expend the income or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations" is not a good charitable bequest.

In re Macduff, [1896] 2 Ch. 451, followed. *In re* HUNTER. HOOD *v.* ATTORNEY-GENERAL
Romer J. 518

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CHEQUE—Tender—Validity—Authority of solicitor - - - - - 171.
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See WILL. 5.

—— Power of disposition amongst — Power coupled with a trust - - 289
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CLERK—Signature by auctioneer's—Statute of Frauds - - - - 663
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COLONIAL TRUSTEES—Appointment of—Form of order - - - - 256
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COLONY—Income tax imposed by colonial legislature—Preference stock - - 911
See COMPANY. 8.

COMMITTAL—Breach of injunction—Aiding and abetting - - - - 545
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COMPANY—*Debenture—Floating Security—Foreclosure—Absent Debenture-holder.*

In a debenture-holders' action, where the debentures constitute a charge on the property of a company by way of floating security, foreclosure cannot be ordered in the absence of any one debenture-holder.

Sadler v. *Worley*, [1894] 2 Ch. 170, and *Welch* v. *National Cycle Co.*, W. N. (1886) 97, Palmer's Company Precedents, 6th ed. Part I. p. 909, considered. *In re* CONTINENTAL OXYGEN COMPANY. ELIAS *v.* CONTINENTAL OXYGEN COMPANY
Kekewich J. 511

2. —— *Debenture-holder—Receiver and Manager—Debenture not actually due—Jurisdiction.*

In an action by debenture-holders of a limited company to enforce their security, the Court has jurisdiction to appoint, not only a receiver of the company's property, but also a manager of its undertaking and business, where the security is in jeopardy—as for instance where the company is practically insolvent and there is a pending winding-up petition—notwithstanding that the

COMPANY—*continued.*

security has not yet "crystallized" by the debenture debt having become actually due; but as the appointment of a manager is made only with a view to the probable necessity of realization it should extend for a limited period only. *In re* VICTORIA STEAMBOATS, LIMITED. SMITH *v.* WILKINSON - - - - **Kekewich J. 158**

3. —— *Debenture-holder's Action—Procedure—Shareholder Plaintiff—Judgment—Certificate—Uncalled Capital—Liability of Plaintiff.*

In an action against a limited company by one debenture-holder on behalf of himself and all other debenture-holders, the chief clerk may, under an inquiry directed by the judgment as to the property charged by the debentures, find what uncalled capital is due from the several shareholders (where uncalled capital is part of the security), notwithstanding that no calls can actually be made in such an action; and where the plaintiff is himself a shareholder and is found indebted in a sum of uncalled capital, he, being a party to the action, is bound by that finding, unless varied by the judge, the Court having jurisdiction to decide in that action the question of the plaintiff's liability without leaving it to be decided by other proceedings. MADELEY *v.* ROSS, SLEEMAN & Co. - - **Kekewich J. 505**

4. —— *Debentures — Winding-up — "Property" both Present and Future—Uncalled Capital—Liquidation.*

A company, having power by its memorandum and articles to borrow on the security of any of its property both present and future, including its uncalled capital, issued debentures charging the undertaking and all its "property whatsoever and wheresoever both present and future" with payment of the sums advanced. The company subsequently went into liquidation:—

Held, that the addition of the word "future" did not extend the meaning of the term "property" as defined by *Stanley's Case* (1864) 4 D. J. & S. 407, and that the debentures were a charge only on the property of the company as it existed at the commencement of the liquidation, and did not include the then uncalled capital. *In re* STREATHAM AND GENERAL ESTATES COMPANY - - - - - **Chitty J. 15**

5. —— *Meeting of Shareholders—Proxies—Blanks in Proxies—Special Resolution—Show of Hands—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 80.

At a meeting of the shareholders of a company the articles of which allow voting by proxy, the chairman, in ascertaining the number of votes given on a show of hands, must count the vote of each person who holds proxies as a single vote, and not count a vote for each of the members whose proxies he holds.

Decision of Chitty J., [1896] 2 Ch. 572, affirmed.

In re Bidwell Brothers, [1893] 1 Ch. 603, overruled.

A notice convening an extraordinary general meeting to confirm a special resolution was accompanied by a circular from the secretary and directors with a proxy attached, asking for the return of the proxy in support of the resolution; by a printer's error the date of the meeting was left blank in the proxy. Several of the members executed and returned their proxies (which were duly stamped) without filling up the blanks, which were filled up by the secretary before the proxies were lodged with the company:—

Held, by the Court of Appeal, affirming the decision of Chitty J., that these proxies were valid within the provisions of the Stamp Act, 1891, s. 80. ERNEST *v.* LOMA GOLD MINES, LIMITED - - - - - **C. A. 1**

6. —— *Memorandum and Articles—Alteration of Articles—Increase of Capital—Preference Shares.*

A limited company, having no authority under its memorandum or articles of association to create any preference between different classes of shares, may by special resolution alter its articles so as to authorize the directors to issue preference shares by way of increase of capital.

Hutton v. *Scarborough Cliff Hotel Co.*, (1865) 2 Dr. & Sm. 521, overruled. ANDREWS *v.* GAS METER COMPANY - - - **C. A. 361**

7. —— *Memorandum and Articles—Construction — Annual General Meeting — Dividend — Accounts.*

The articles of a company provided for the submission of accounts up to a date within three months and reports thereon, the sanction of a dividend, and the transaction of the ordinary business at the annual general meeting:—

Held, that a final dividend could not be sanctioned except at an annual general meeting at which accounts up to the prescribed date and reports thereon were submitted. NICHOLSON *v.* RHODESIA TRADING CO. - - **North J. 434**

8. —— *Preference and Ordinary Stockholders—Incidence of Income Tax imposed by Colonial Legislature.*

An English company, which carried on business in a colony, passed resolutions under which a class of guaranteed preference stockholders became entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to the other stockholders. By a subsequent Act of the colonial legislature a duty, in the nature of income tax, was imposed on all dividends or interest paid out of assets in the colony to the members of companies carrying on business therein, and it was declared that the duty payable in respect of the amount received by any member should be a debt due by him to the Crown:—

Held, that the contract between the preference and ordinary stockholders being an English contract, the rights under it of preference stockholders, not domiciled in the colony, were not affected by the colonial Act, and that they were therefore entitled to their 6 per cent. without any deduction in respect of the colonial duty. SPILLER *v.* TURNER - - **Kekewich J. 911**

9. —— *Reduction of Capital — Capital in excess of Requirements of Company — Form of Minute to be Registered. In re* LAMSON STORE SERVICE COMPANY - - **Stirling J. 875, n.**

10. —— *Reduction of Capital—Capital "in excess of the wants of the Company"—Return to*

COMPANY—*continued.*

Shareholders — Issue of Debentures — Companies Acts, 1867 *and* 1877.

The Court, upon the requirements of the Companies Act, 1867, ss. 13, 14 being satisfied, confirmed a scheme of reduction under which a portion of the capital of a company was to be returned to the shareholders, although a part of the portion so returned was to be immediately borrowed from them by the company on debentures. *In re* NIXON'S NAVIGATION COMPANY Stirling J. 872

11. —— *Reduction of Capital — Different Classes of Shareholders — Alteration of Voting Rights.*

The Court has power in a proper case to confirm a resolution for reduction of capital notwithstanding that the voting powers may be thereby affected.

Hutton v. *Scarborough Cliff Hotel Co.*, (1865) 2 Dr. & Sm. 521, and *In re Continental Union Gas Co.*, (1891) 7 Times L. R. 476, observed upon. *In re* JAMES COLMER, LIMITED - Romer J. 524

12. —— *Register of Mortgages — Right of Debenture-holder to take Copies—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 43.

The right of a creditor or member of a company to inspect the register of mortgages under s. 43 of the Companies Act, 1862, includes a right to take copies of the register. NELSON *v.* ANGLO-AMERICAN LAND MORTGAGE AGENCY COMPANY - - - - Stirling J. 139

13. —— *Shareholder — Rectification of Register—Underwriting Letter—Acceptance—Principal and Agent—Authority to apply for Shares—Estoppel.*

By an underwriting letter, addressed to the Mines Company, Stark offered to subscribe or find subscribers, on or before September 21, for 10,000 shares, "or such less number as may be accepted by you," in the Consort Company, which the Mines Company were promoting, "and, in the event of my failing to comply with the terms herein stated, I authorize you as my agent, on my behalf and in my name, to apply for the number of shares (full or reduced, as the case may be) guaranteed by me as above." It was agreed that the letter was irrevocable, provided that 40,000 shares were underwritten or applied for prior to the public issue of the prospectus of the Consort Company, and allotment made on or before September 30. No notice of the acceptance of this offer was sent to Stark, but a form of acceptance at the foot of it was signed by the secretary of the Mines Company. The Consort Company having been registered, the Mines Company, without any previous notice to Stark, applied on his behalf for an allotment to him of shares in the Consort Company, and 9000 shares were accordingly allotted to him and registered in his name. Upon a motion by Stark to rectify the register by omitting his name:—

Held, by the Court of Appeal, that the underwriting letter did not constitute a contract binding Stark to take shares until it had been accepted by the Mines Company and notice of acceptance had been given to him; that the authority to the Mines Company to apply for shares in his name did not arise until he had

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been informed by that company of the number of shares for which they accepted his offer, and he had failed to apply himself for that number; that he was not estopped as against the Consort Company from denying the authority of the Mines Company to apply for shares in his name; and that he was entitled to have his name removed from the register of members of the Consort Company.

Decision of North J. as to estoppel reversed.

Ex parte Harrison (1893) 69 L. T. (N.S.) 204, distinguished. *In re* CONSORT DEEP LEVEL GOLD MINES, LIMITED. *Ex parte* STARK - C. A. 575

14. —— *Winding-up—Auditor—"Officer"—Misfeasance—Companies (Winding-up) Act*, 1890 (53 *&* 54 *Vict. c.* 63), *s.* 10.

An auditor may or may not be an "officer" of a company, and primâ facie he is not; but if he is appointed to the office of auditor to the company, and acts in that office, he will be an "officer" within s. 10 of the Companies (Winding-up) Act, 1890; and in case the company is wound up he will be liable to a misfeasance summons under that section in respect of dividends declared upon the faith of his audit; and no irregularity in his appointment would avail him as a defence. But, seeing that the word "auditor" does not occur in s. 10, the performance of auditor's work upon a given occasion by a person who has never been appointed to the office of auditor of the company does not make that person an "officer" of the company so as to render him liable under the section.

The decision of Stirling J. reversed. *In re* WESTERN COUNTIES STEAM BAKERIES AND MILLING COMPANY - - - - C. A. 617

15. —— *Winding-up—Contributory—Transfer of Shares during voluntary Liquidation—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 38, 131, 133, 153.

The power of a voluntary liquidator under s. 131 of the Companies Act, 1862, to sanction a transfer of shares made after the commencement of the winding-up, involves the power to alter the register of members; and the transferor is thereupon released from the liability which he was under at the commencement of the winding-up to contribute as a present member, and the transferee alone is the person to be placed on the A list of contributories.

Where successive transfers are sanctioned by the liquidator under s. 131, the ultimate transferee only is liable to contribute as a present member, the transferor and prior transferees being liable as past members. *In re* NATIONAL BANK OF WALES. TAYLOR, PHILLIPS, AND RICKARDS' CASES - - - C. A. 298

16. —— *Winding-up—Liability of Vendors—Purchase-moneys of Vendors' Property—Payment in fully paid-up Shares—Issue of Shares at a Discount—Contract — Apportionment of Value—Stamp Duty—Value of Property purchased—Inquiry into—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25.

Although a limited company cannot release a shareholder from the obligation to pay for his shares either in money or money's worth, and cannot therefore issue its shares at a discount, it

COMPANY—*continued.*

can, provided the contract is duly registered under the 25th section of the Companies Act, 1867, buy property at any price it thinks fit, and can pay for such property in fully paid-up shares; and the transaction will be valid and binding upon its creditors if the company has acted in it honestly and not colourably, and has not been so imposed upon by the vendor as to be entitled to be relieved from its bargain.

The value received by the company is measured by the price at which the company agreed to buy the property it sought to acquire; and whilst the transaction is unimpeached that is the only value which this Court can take into consideration.

Decision of Vaughan Williams J. affirmed. *In re* WRAGG, LIMITED - - **C. A. 796**

17. —— *Winding-up—Practice—"Just and Equitable"—Substratum gone—Fraud—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 5.

A company fraudulent in its inception, carrying on a small business at a loss, having no capital of its own—all the subscribed capital having found its way into the hands of the real, though not the ostensible, promoters—and hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud, was ordered by the Court of Appeal (affirming Vaughan Williams J.) to be wound up, the Court holding that the case was one in which it was "just and equitable," within s. 79, sub-s. 5, of the Companies Act, 1862, to make the order, that being the most effective means for recovering for the shareholders the money dishonestly retained by the real promoters, *In re* BRINSMEAD (T. E.) & SONS **C. A. 406**

—— Distress for rent—Rights of debenture-holders' receiver - - - **373**
See MINE.

CONDITION—Continuing condition—Gift for endowment of church - - **85**
See ECCLESIASTICAL LAW.

CONDITIONS—Breach of—Building agreement—Option to purchase - - **937**
See LANDLORD AND TENANT. 1.

CONTEMPT OF COURT—*Breach of Injunction—Person not enjoined or Party to Action—Aiding and Abetting—Committal.*

There is a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, and a motion to commit a man on the ground that he has aided and abetted a defendant in a breach of an injunction. In the first case the order is made to enable the plaintiff to get his rights; in the second, because it is not for the public benefit that the course of justice should be obstructed.

The Court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it.

Decision of North J. affirmed. SEAWARD *v.* PATERSON - - - - **C. A. 545**

CONTRACT—*Agreement for Lease—Signature not final—Parol Evidence—Escrow.*

The plaintiff, a spinster, having signed an agreement for the lease of a house to her by the defendant, the defendant subsequently signed it, and handed it to his solicitor with instructions not to part with it except on condition that the plaintiff obtained some responsible person to join in the lease—a condition which the plaintiff declined to fulfil:—

Held, that evidence was admissible to shew that no agreement was come to between the parties, and that the true effect of the transaction was that the defendant declined to enter into an agreement on the terms of the written document, but at the same time made a counter offer which was rejected, and that there was no agreement. PATTLE *v.* HORNIBROOK - - **Stirling J. 25**

2. —— *Author and Publisher—Publishing Agreement—Assignability.*

The principle established by *Stevens* v. *Benning*, (1854) 1 K. & J. 168, *Reade* v. *Bentley*, (1857) 3 K. & J. 271, and *Hole* v. *Bradbury*, (1879) 12 Ch. D. 886, that a publishing agreement between an author and a publisher, or a firm of publishers, is personal to the individuals entering into it, and that the benefit of such an agreement is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company. GRIFFITH *v.* TOWER PUBLISHING COMPANY, LIMITED, AND MONCRIEFF - **Stirling J. 21**

—— Signature of auctioneer's clerk—Statute of Frauds - - - - **663**
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CONTRIBUTORY—Transfer of shares during voluntary liquidation - - **298**
See COMPANY. 15.

CONVERSION—Leaseholds—Successive interests
See WILL. 1. **881**

COPY—Right to take—Register of mortgages
See COMPANY. 12. **130**

COPYRIGHT—*Registration—Validity—Literary and Artistic—Trustee or Agent—Book containing Drawings—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 13—*Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4.

Registration of copyright under the Copyright Act, 1842, or the Fine Arts Copyright Act, 1862, in the name of a person who is a mere agent or nominee of the proprietor of the copyright, and not a trustee of the copyright for him, is bad; and joinder of the unregistered proprietor as co-plaintiff with the person so improperly registered will not render an action for infringement of the copyright maintainable.

London Printing and Publishing Alliance v. *Cox*, [1891] 3 Ch. 291, followed.

Accordingly, where copyright which belonged to a limited company was registered in the sole name of their managing director, and it was not shewn that he was a trustee of the copyright for them, an action for infringement of the copyright by the director and company as co-plaintiffs was held not to be maintainable.

Registration of a book under the Copyright Act, 1842, in the name of the author of the letter-press does not confer any protection in respect of

COPYRIGHT—*continued.*
drawings which are introduced into the book as illustrations and the art copyright in which is vested in other persons.

Grace v. *Newman*, (1875) L. R. 19 Eq. 623, distinguished.

Under the Fine Arts Copyright Act, 1862, it is not necessary that any agreement in writing should be made or entered on the register where registration is in the name of the person for or on behalf of whom a drawing is made or executed for a good or valuable consideration. PETTY *v.* TAYLOR - - - - Kekewich J. 465

CORPUS—Income or—Leaseholds—Outgoings 876
See TENANT FOR LIFE AND REMAINDERMAN. 2.

COSTS—Interest on—"Person liable" - 119
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—— Lease—Scale charge - - - 400
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—— London agent—Charges of—Taxation 284
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—— Practice - - - - 699, 741
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—— Sanitary works—Leasehold house - 32
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—— Severance in defence — Administration action - - - - 251
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—— Street—Making up—Recovery of expenses
See NATIONAL SCHOOL. 843

—— Unauthorized use of plaintiff's name 479
See PRACTICE. 3.

—— Underlease—Scale charge - - 144
See SOLICITOR. 4.

COUNTY COURT RULES, 1889, Order LI., r. 23
See PRACTICE. 9. 151

COVENANT — *Assignment — Covenant against, without Licence—Licence to assign—"Fine or Sum of Money in the nature of a Fine"—Deposit by way of Security—Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

A building lease, which had been granted under a building contract relating also to other property, contained an absolute covenant not to assign without licence. The lessors on being applied to for a licence to assign refused to grant it unless the lessee would deposit with them 2000*l.* as a further security for the performance by him of the unperformed part of the building contract:—

Held (affirming the decision of Stirling J.), that the deposit with the lessors of a sum of money which, if the lessee performed the building contract, would revert to him, was not payment of a "fine or sum of money in the nature of a fine" within the meaning of the Conveyancing and Law of Property Act, 1892, s. 3, and that the lessors might lawfully require such a deposit as a condition for granting the licence. *In re* COSH'S CONTRACT - - - - - C. A. 9

—— Breach of—Sufficiency of notice—Forfeiture - - - - 271
See LANDLORD AND TENANT. 2.

COVENANT—*continued.*
—— Not to buy wines except from lessor—Assignment of lease - - - 767
See LANDLORD AND TENANT. 3.

—— To pay water rate—Water supplied for trade purposes - - - 633
See WATER RATE.

—— To settle after-acquired property—Accumulations—Investment - - 719
See SETTLEMENT. 1.

CROWN DEBT—Priority—Specialty and simple contract debts - - - 673
See ADMINISTRATION.

CUSTODY—Infant children - - - 786
See INFANT.

DEBENTURE—Foreclosure—Absent debentureholder - - - - 511
See COMPANY. 1.

—— Not actually due—Appointment of receiver and manager - - - 158
See COMPANY. 2.

—— Register of mortgages—Right to take copies
See COMPANY. 12. 130

—— Uncalled capital - - - 15, 505
See COMPANY. 3, 4.

DEBTS—Charge of—Liability of estate - 489
See SETTLEMENT. 3.

DEED—Execution of—Presumption - 164
See POWER. 1.

DELAY—Express trust—Statutes of Limitations
See FRAUDS, STATUTE OF. 196

—— In proving will—Loss of interest - 422
See EXECUTOR. 1.

DEPOSIT—By way of security—Licence to assign
See COVENANT. 9

DEROGATION—From grant—Building land—Light - - - - 602
See VENDOR AND PURCHASER. 1.

DETERMINATION OF TENANCY — Building agreement—Option to purchase - 937
See LANDLORD AND TENANT. 1.

DISCONTINUANCE—Action—Unauthorized use of plaintiff's name - - - 115
See PRACTICE. 4.

DISCOUNT—Issue of shares at a—Contract 796
See COMPANY. 16.

DISCOVERY—Production of books—Sealing up irrelevant entries - - - 761
See PRACTICE. 5.

—— Production of documents—Solicitor's lien
See PRACTICE. 6. 678

DISTRESS—Chattels of lessee on adjoining mine
See MINE. 373

—— Guardians levying—Receiver in lunacy 123
See LUNACY. 2.

DIVIDEND—Accounts—Annual general meeting
See COMPANY. 7. 434

DOCUMENTS—Production of—Solicitor's lien 678
See PRACTICE. 6.

DOMICIL—Foreign bankruptcy—English domicil —Forfeiture - - - 905
See WILL. 2.

DUTY—Public revenue - - 99, 484
See REVENUE. 1, 2.

—— Stamp—Apportionment of value—Contract
See COMPANY. 16. 796

—— Succession — Appointment — Stock "sufficient to raise" a net sum - - 888
See POWER. 2.

EASEMENT—*Right of Way—Grant in Gross—Covenant with Yearly Tenant and his "Heirs and Assigns"—Effect of acquiring Fee Simple.*

A., the owner in fee of Three-acre, conveyed it to B. by a deed dated March 12, 1869, which recited that it had been agreed that on completion of the purchase B. should grant to A., his "heirs and assigns," a right of way over a defined footway leading from a public road across Three-acre to Blackacre. The deed also referred to another deed as then prepared, which when executed was dated March 13, 1869, whereby B., in pursuance of this agreement and in consideration of the conveyance of Three-acre, covenanted and granted with and to A., his "heirs and assigns," that it should be lawful for them and the tenants and occupiers for the time being of Blackacre to use the footway. A. was then and until 1870, when he purchased the fee simple, only tenant from year to year of Blackacre:—

Held, that, notwithstanding the limited interest of A. when the easement was granted, and the cesser of that interest by merger in 1870, a lessee of Blackacre claiming under the freehold title of A. was entitled to use the footway. RYMER *v.* MCILROY - - - Byrne J. 528

ECCLESIASTICAL LAW—*Clergy—"Preaching"—"Ministration"—"Ornaments of the Minister"—Black Gown in Pulpit—Custom—Long Usage—Will—Charitable Legacy—Gift for Endowment of Church—Continuing Condition.*

A testatrix bequeathed 1500*l.* towards the endowment of a church, provided certain conditions were carried out in every particular, and under this stipulation alone was her executor empowered to pay it. One of the conditions, called by the testatrix an "abiding condition," was "that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal."

The fund being in court in an action to administer the estate of the testatrix:—

Held, by the Court of Appeal (Lord Russell of Killowen C.J., Lindley and A. L. Smith L.JJ.), agreeing with North J., [1892] 1 Ch. 95, that the condition was a continuing condition, so as to entitle the incumbent of the church to the income of the fund from time to time so long as he performed the condition.

It is not illegal for a clergyman of the Church of England to wear a black gown in the pulpit when preaching, the legality of the black gown in preaching being sanctioned by the continuous usage of centuries uncontrolled by positive law or judicial decision.

Decision of North J. affirmed.

ECCLESIASTICAL LAW—*continued.*

Dictum of Sir R. Phillimore in *Elphinstone* v. *Purchas*, (1870) L. R. 3 A. & E. 91, disapproved of.

Ridsdale v. *Clifton*, (1877) 2 P. D. 276, considered. *In re* ROBINSON. WRIGHT *v.* TUGWELL C. A. 85

EJECTMENT—Receiver—Disputed title - 64
See PRACTICE. 7.

ENGINE—Trade fixture—Hiring agreement 182
See FIXTURES.

ESCROW—Agreement for lease—Signature not final - - - - - 25
See CONTRACT. 1.

ESTATE DUTY—Appropriated funds — Debt on incumbrance - - - 99
See REVENUE. 2.

ESTOPPEL—*Settlement of Land by Grantor having no Title—Entry of Tenant for Life under the Settlement and Acquisition of Possessory Title—Rights of Remaindermen—Statutes of Limitations.*

Where a grantor who has no title purports to grant a particular piece of land by deed to A. for life with remainders over, and A. enters under the deed and acquires a good title by possession against the true owner, A. is estopped as against the remaindermen from disputing the validity of the deed.

The principle of *Hawksbee* v. *Hawksbee*, (1853) 11 Hare, 230, and *Board* v. *Board*, (1873) L. R. 9 Q. B. 48, applied.

Paine v. *Jones*, (1874) L. R. 18 Eq. 320, and *In re Stringer's Estate*, (1877) 6 Ch. D. 1, explained and distinguished. DALTON *v.* FITZGERALD - - - - Stirling J. 440

—— Authority to apply for shares—Underwriting letter - - - - 575
See COMPANY. 13.

EVIDENCE—Agreement for lease — Signature not final - - - - 25
See CONTRACT. 1.

—— Intent to deceive—Admissibility — Trademark - - - - 893
See TRADE NAME.

—— Parol — Statute of Frauds — Purchase as trustee - - - - 196
See FRAUDS, STATUTE OF.

—— Presumption—Deed more than thirty years old - - - - 164
See POWER. 1.

—— Service by post—Notice - - 41
See PRACTICE. 8.

EXECUTION—Judgment — "Action on a contract" - - - - 276
See RAILWAY.

—— Power of attorney—Presumption - 164
See POWER. 1.

EXECUTOR—*Acceptance of Office — Wilful Default—Delay in proving Will—Loss of Interest.*

Executors appointed by a will did not obtain probate of the will for seven years after the testator's death, when probate was granted to one of them alone. The executors could not obtain payment of the money due upon a policy of insurance on the testator's life until the will had been proved, but the money was then paid in full, with

EXECUTOR—*continued.*
interest at the rate of 1 per cent. per annum. Meanwhile, the executors had had to pay out of the estate interest at the rate of 5 per cent. per annum upon a debt of the testator, which was secured by a mortgage of the policy:—

Held, that the executors could not be ordered to account on the footing of wilful default by reason of this loss of interest.

Some years before the will had been proved the executors endeavoured to induce the insurance company to pay the policy money to the mortgagees on account of their debt, and signed a letter addressed to the company authorizing them to do so:

Held, that by so doing the executor who did not prove the will had accepted the office of executor, and could not afterwards renounce probate, and that he was liable to account as an executor for what he had received on behalf of the testator's estate. *In re* STEVENS. COOKE *v.* STEVENS North J. 422

2. —— *Bankruptcy—Injunction restraining Executor from further acting as Executor—Jurisdiction.*

The Court has jurisdiction to restrain an executor who has become bankrupt since the death of the testator from further acting as executor; and, if there is a co-executor willing to continue to act, will not require the appointment of a receiver. BOWEN *v.* PHILLIPS Kekewich J. 174

FINE—Licence to assign—Deposit by way of security - - - - 9
See COVENANT.

FIXTURES—*Trade Fixture—Hiring Agreement—Gas Engine—Mortgage of Trade Premises—Entry of Mortgagee into Possession—Right of Removal by Owner.*

In determining whether or not a chattel has become a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation.

Holland v. *Hodgson*, (1872) L. R. 7 C. P. 328, explained.

Wood v. *Hewett*, (1846) 8 Q. B. 913, and *Lancaster* v. *Eve*, (1859) 5 C. B. (N.S.) 717, distinguished.

A gas engine was let out on the hire and purchase system under an agreement in writing, which provided that it should not become the property of the hirer until the payment of all the instalments, and should be removable by the owner on the failure of the hirer to pay any instalment. The engine was affixed to freehold land of the hirer by bolts and screws to prevent it from rocking, and was used by him for the purposes of his trade. Default having been made in the payment of the instalments, the engine was claimed by the owner, and also by a mortgagee of the land, who took his mortgage after the hiring agreement and without notice of it, and had entered into possession while the engine was still on the land:—

Held, that the engine was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the

FIXTURES—*continued.*
hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; and consequently that it passed to the mortgagee as part of the freehold:

Held, further, that even if a licence to remove the engine could be implied from the mortgagee leaving the mortgagor in possession, the entry of the mortgagee into possession determined such licence.

Gough v. *Wood & Co.*, [1894] 1 Q. B. 713, and *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.*, [1892] 1 Ch. 415, discussed. HOBSON *v.* GORRINGE - C. A. 182

FLOATING SECURITY—Foreclosure—Absent debenture-holder - - - 511
See COMPANY. 1.

FORECLOSURE—Absent debenture-holder—Floating security - - - 511
See COMPANY. 1.

—— Form of judgment—Practice - 19
See MORTGAGE.

FOREIGN BANKRUPTCY—Forfeiture—English domicil - - - - 905
See WILL. 2.

FOREIGN SUBJECT—Payment out of Court—Jurisdiction - - - - 453
See LUNACY. 1.

FORFEITURE—Breach of covenant—Sufficiency of notice - - - - 271
See LANDLORD AND TENANT. 2.

—— Foreign bankruptcy—English domicil 905
See WILL. 2.

FRAUD—Fund in Court—Payment out to wrong person—Replacement - 213, 222, n.
See PRINCIPAL AND AGENT. 1, 2.

—— Winding-up of company—Substratum gone
See COMPANY. 17. 406

FRAUDS, STATUTE OF—*Evidence—Admissibility of parol evidence—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 7—*Purchase as Trustee—Express Trust—Statutes of Limitations—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 49—*Delay—Taking Accounts before Official Referee—Practice—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 13, 14—*Rules of Supreme Court*, 1883, *Order* XXXIII., *rr.* 2, 3, 4.

Prior to 1873 the plaintiff, a married woman, was owner of certain estates in Ceylon subject to a considerable mortgage. In 1873 the mortgagees sold and conveyed the estates to the defendant, who, without the privity of the plaintiff, raised large sums by mortgage of them, and afterwards became bankrupt in 1879, and obtained his discharge in 1880. The estates were afterwards sold by the mortgagees. The plaintiff's case was that the defendant had purchased the estates as trustee for her subject to a lien for his advances. In 1880 the defendant's trustee in bankruptcy repudiated the plaintiff's title. The defendant never expressly did so, and the plaintiff never gave either of them to understand that she had given up her claim; but she took no active steps to assert it till 1894, when she commenced an action against the defendant asking for a declaration that the defendant purchased as a trustee for her, and for an account of his

FRAUDS, STATUTE OF—*continued.*
dealings with the property, and payment of what should be found due from him. The defendant pleaded—(1.) that the estates were conveyed to him as beneficial owner; (2.) that the trust alleged by the plaintiff was not evidenced by any writing signed by the defendant, and that the Statute of Frauds was a defence; (3.) that the plaintiff's claim, if proved, was barred (*a*) by the defendant's bankruptcy; (*b*) by the Statutes of Limitations; (*c*) by laches and delay. Kekewich J. held that no trust was proved, and dismissed the action on the first ground. The Court of Appeal, being of opinion that the evidence, which partly consisted of letters signed by the defendant, completely proved that the defendant purchased as a trustee for the plaintiff, and held the estates as such trustee subject to a lien for his expenditure:—

Held, that even if the letters signed by the defendant did not contain enough to satisfy s. 7 of the Statute of Frauds, parol evidence was admissible; and as the whole of the evidence taken together established that the defendant had purchased as a trustee, the plaintiff was entitled to a decree.

The Statute of Frauds does not prevent proof of a fraud, and it is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. Therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him.

Bartlett v. *Pickersgill*, (1759) 1 Eden, 515, is inconsistent with a series of later decisions, and is not now law.

A trust thus established is an express trust within the definition given in *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, and the Statute of Limitations, therefore, is no defence to the claim; nor is the bankruptcy of the grantee, if governed by the Bankruptcy Act, 1869, a defence to an action for an account of his dealings with the estates, since by s. 49 of that Act bankruptcy does not bar the claims of a cestui que trust.

The defendant knew that land held by the defendant was claimed by the plaintiff as having been conveyed to the defendant as a trustee for her; and in the correspondence between them he never denied her title, though he never expressly admitted it. The plaintiff took no proceedings for twelve years after the correspondence between them had ceased:—

Held, that as she had done nothing actively to lead the defendant to suppose that she had given up her claim, there was nothing against her but the lapse of time; and that the mere lapse of time in a case of express trust was not a bar.

A very difficult account directed to be taken by an official referee instead of in chambers, on account of the great saving of time which would thus be effected. ROCHEFOUCAULD *v.* BOUSTEAD C. A. 196

—— Signature by auctioneer's clerk on behalf of purchaser - - - - 663
See PRINCIPAL AND AGENT. 3.

GENERAL WORDS—Building land—Light—Derogating from grant - - 602
See VENDOR AND PURCHASER. 1.

GRANT—Derogating from—Light—Building estate - - - - 602
See VENDOR AND PURCHASER. 1.

GUARDIAN—Infant children—Custody - 786
See INFANT.

GUARDIANS OF POOR—Loan—Redemption—Consent of lender - - - 335
See POOR LAW.

HEIRLOOMS—Sale of—Land purchased with proceeds—Jointures and portions 712
See SETTLED LAND. 1.

HIGHWAY—Removal of obstructions—Interested member - - - - 35
See LOCAL GOVERNMENT. 1.

HOTCHPOT—Construction of will - - 325
See WILL. 3.

—— Two funds—Referential trusts - 946
See SETTLEMENT. 2.

HOTEL—Covenant not to buy wines except from lessor—Assignment of lease - 767
See LANDLORD AND TENANT. 3.

INCOME—Capital or—Cost of sanitary works 32
See TENANT FOR LIFE AND REMAINDERMAN. 1.

—— Corpus or—Leaseholds—Repairs and outgoings - - - - 876
See TENANT FOR LIFE AND REMAINDERMAN. 2.

INCOME TAX—Imposed by colonial legislature—Preference and ordinary stockholders
See COMPANY. 8. 911

INDEMNITY—Liability to co-trustee—Breach of trust - - - - 536
See TRUSTEE. 1.

INFANT—*Custody—Talfourd's Act* (2 *&* 3 *Vict. c.* 54)—*Custody of Infants Act*, 1873 (36 *&* 37 *Vict. c.* 12)—*Guardianship of Infants Act*, 1886 (49 *&* 50 *Vict. c.* 27), *s.* 5.

Under s. 5 of the Guardianship of Infants Act, 1886, the Court has, after taking into account the various considerations mentioned in that section, full jurisdiction to override entirely the common law rights of a father in relation to the custody of his infant children.

In "having regard to . . . . the conduct of the parents and the wishes as well as of the mother as of the father," the Court will not treat the parents in an unequal manner or differently the one from the other, but will take the whole conduct and wishes of both parents into consideration.

The Court will in a proper case give a mother the custody of her infant children, notwithstanding that the mother may have been guilty of matrimonial misconduct. *In re* A. AND B. (INFANTS) - - - - C. A. 786

—— Appointment of Colonial trustees—Form of order - - - - 256
See SETTLED LAND. 4.

INFANT—*continued.*
—— Payment of costs by solicitors—Unauthorized use of name - - - 479
See PRACTICE. 3.

INJUNCTION—Breach of—Aiding and abetting—Committal - - - 545
See CONTEMPT OF COURT.
—— Trade-mark—Evidence of intent to deceive
See TRADE NAME. 893
—— Vacant land—Deposit of filth by third parties
See NUISANCE. 560

INN—Agreement for sale—Transfer of licence—Interim protection - - 705
See VENDOR AND PURCHASER. 2.
—— Covenant not to buy wines except from lessor - - - - - 767
See LANDLORD AND TENANT. 3.

INSOLVENT ESTATE—Crown debt—Specialty and simple contract debts—Priority 673
See ADMINISTRATION.

INSURANCE, ACCIDENT—*Policy—Contract—Renewal—Continuation of Old Contract—New Contract—Policy Money—Insolvency—Creditors' Deed.*

Accident policy renewable yearly so long as the assured pays the specified premium in advance and the insurance company consent to receive it, and requiring the assured at each renewal to give notice of any change in his state of health since the payment of the last premium, with power for the company in such case to determine the policy:

Upon the payment of the premium for each year, an entirely new contract arises for that year only, and the amount payable under it on the accidental death of the assured in the current year for which a premium has been paid is not affected by any assignment or other obligation made or entered into by the assured in any previous year and not extending to after-acquired property. STOKELL *v.* HEYWOOD
Kekewich J. 459

INTEREST—Costs — Administration action—"Person liable" - - - 119
See SOLICITOR. 2.

INVESTMENT—By wife of accumulations—Covenant to settle after-acquired property - - - - - 719
See SETTLEMENT. 1.

IRRELEVANCY—Striking out pleadings—Practice - - - - - 35
See LOCAL GOVERNMENT. 1.

JOINT TENANCY—*Severance—Effect of Marriage—Lease by Husband of one Joint Tenant and the other Joint Tenant.*

The marriage of a woman having a joint estate in freeholds or leaseholds does not operate as a severance of her joint tenancy; nor does the granting of a lease by the husband and the other joint tenant, reserving the rent to the lessors jointly, necessarily effect a severance of the wife's joint tenancy. PALMER *v.* RICH Stirling J. 134

JOINTURE—Sale of heirlooms—Land purchased with proceeds - - - 712
See SETTLED LAND. 1.

JUDGMENT—Execution—"Action on a contract" - - - - 276
See RAILWAY.

JURISDICTION—Costs—Disallowance of—Extravagant litigation - - 741
See PRACTICE. 1.
—— Executor—Restraining from further acting as - - - - - 174
See EXECUTOR. 2.
—— Motion to strike out name—Discontinuance of action - - - - 115
See PRACTICE. 4.
—— Payment out of court—Foreign subject 453
See LUNACY. 1.
—— Rebuilding—Expenditure of money in 685
See SETTLED LAND. 3.
—— Receiver—Appointment - - 158
See COMPANY. 2.
—— Service out of—Waiver - - 151
See PRACTICE. 9.

LANDLORD AND TENANT—*Building Agreement—Option to Purchase—Interest of Tenant after Exercise of Option—Breach of Conditions—Power of Landlord to Determine.*

By a building agreement the defendant agreed to erect certain buildings, and carry out certain works, on the plaintiff's land within a specified time, and "forthwith to proceed" with and complete the works, when a lease for ninety-nine years was to be granted; the agreement provided that if the defendant did not perform the several stipulations therein contained, the plaintiff might by notice in writing determine the agreement and re-enter; it also contained an option to the defendant to purchase the freehold. The plaintiff being dissatisfied with the slow progress made by the defendant, gave him notice to determine the agreement; but the defendant having previously given notice to the plaintiff of his intention to exercise the option to purchase, declined to give up possession. On an action by the plaintiff to restrain the defendant from trespassing on or interfering with the plaintiff's possession of the land:—

Held, on the evidence, that the defendant had made default in not "forthwith proceeding" to carry out the stipulations of the agreement; but that as there was no condition precedent that the defendant should not have committed any breach of the conditions contained in the building agreement, the option to purchase was well exercised, and a binding contract was thereby made for the sale and purchase of the property; that the determination of the leasing part of the building agreement by the notice given to the defendant for breach of its conditions, did not destroy or affect the contract for sale created by the exercise of the option to purchase; and that the plaintiff's action must therefore be dismissed.

The rights and position of a purchaser in the interval between the commencement of the contract and the completion of the purchase discussed. RAFFETY *v.* SCHOFIELD Romer J. 937

2. —— *Lease—Forfeiture—Breach of Covenant—Notice of "Particular Breach"—Sufficiency of Notice—Action to recover Possession—Damages*

LANDLORD AND TENANT—*continued.*

—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

The notice to be served by a lessor on his lessee, under s. 14, sub-s. 1, of the Conveyancing Act, 1881, "specifying the particular breach of covenant complained of," to entitle the lessor to enforce by action a right of re-entry for the breach, must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought.

A mere general notice of breach of a specified covenant is not sufficient.

A notice by a lessor to his lessee that "you have broken the covenants for repairing the inside and outside of the houses" (describing them) contained in a specified lease :—

Held, to be insufficient, and on this ground an action by the lessor to recover possession of the demised houses for breach of covenant was dismissed with costs :

Held, also, that the lessor could not maintain the action for damages for the breach. FLETCHER *v.* NOKES - - - - North J. 271

3. —— *Lease — Hotel — Lessee's Covenant — Covenant not to buy Wines except from Lessor, his Successors or Assigns—Proviso for Abatement of Rent—Covenant running with the Land—Assignment of Wine Business—Assignment of Lease.*

A lease by a wine merchant of an hotel for thirty years at a rent of 1500*l.* a year contained a covenant by the lessee with the lessor, his heirs and assigns, that he, the lessee, would not during the term buy or sell on the premises any foreign wines other than should have been supplied by the lessor, his successors or assigns; and it was provided that so long as the lessee should observe this covenant the lessor should allow the lessee an abatement of 75*l.* from each quarter's rent.

The lessor died during the term. The plaintiffs, who were his executors, sold his wine business to the firm of W. & P.; and the lessee assigned the lease of the hotel to the defendants. The defendants claimed that, so long as they continued to buy wines from W. & P., they were entitled to the abatement from each quarter's rent; but the plaintiffs insisted that, when the ownership of the wine business and the ownership of the reversion upon the lease were severed, the covenant to buy wines ceased to be operative, and consequently that the defendants were not entitled to the benefit of the proviso :—

Held, (1.) that, although the covenant to buy wines did not in terms include the assigns of the lessee, the burden of it ran with the tenant's interest under the lease, and (2.) that the assigns of the lessee were still bound by the covenant and entitled to the benefit of the proviso for abatement of rent.

The decision of Kekewich J. affirmed. WHITE *v.* SOUTHEND HOTEL COMPANY - C. A. 767

—— Covenant to pay water rate—Water supplied for trade purposes - - - 633
See WATER RATE.

LEASE - - - - 271, 767, 937
See LANDLORD AND TENANT. 1—3.

LEASE—*continued.*

—— Agreement for—Signature not final—Parol evidence - - - - 25
See CONTRACT. 1.

—— Costs—Taxation - - - 400
See SOLICITOR. 3.

—— Covenant to pay water rate—Water supplied for trade purposes - - - 633
See WATER RATE.

—— Distress—Chattels of lessee on adjoining mine - - - - - 373
See MINE.

—— Receipt of bribe from lessee—Invalidity
See SETTLED LAND. 2. 315

—— Severance—Effect of marriage - 134
See JOINT TENANCY.

LEASEHOLDS—Conversion — Residuary gift — Successive interests - - 881
See WILL. 1.

—— Cost of sanitary works—Capital or income 32
See TENANT FOR LIFE AND REMAINDERMAN. 1.

—— Repairs and outgoings—Corpus or income 876
See TENANT FOR LIFE AND REMAINDERMAN. 2.

—— Sale of—Underlease—Scale charge - 144
See SOLICITOR. 4.

LICENCE—Covenant against assignment without —Deposit by way of security - 9
See COVENANT.

—— Transfer—Agreement for sale of public-house - - - - 705
See VENDOR AND PURCHASER. 2.

LIEN—Solicitor's—Production of documents
See PRACTICE. 6. 678

LIGHT—*Obstruction—Actio personalis—Continuance of Obstruction—Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 2.

The continuance of an obstruction to ancient lights is an "injury committed" in respect of property within the meaning of 3 & 4 Will. 4, c. 42, s. 2, giving rise to a cause of action de die in diem, and therefore an action in respect of the continuance of the obstruction in the lifetime of the person who caused it may be maintained against his executors or administrators notwithstanding that the obstructing building was completed more than six calendar months before his death.

Woodhouse v. *Walker*, (1880) 5 Q. B. D. 404, followed. JENKS *v.* VISCOUNT CLIFDEN Kekewich J. 694

—— Building estate—Implied grant—Derogating from grant - - - 602
See VENDOR AND PURCHASER. 1.

LIMITATIONS, STATUTES OF—Express trust—Parol evidence - - - 193
See FRAUDS, STATUTE OF.

—— Possessory title—Rights of remaindermen
See ESTOPPEL. 440

LOAN—Redemption—Consent of lender - 335
See POOR LAW.

LOCAL GOVERNMENT—*Highway Authority—Removal of Obstruction—Right of Way—Local Board—Interested Member—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 26, 46—*Practice—Pleading—Striking out—Irrelevancy.*

A local board discharging duties in relation to the protection of public rights of way under s. 26, sub-s. 1, of the Local Government Act, 1894, is in the same position as a private individual protecting his own property, and is not acting judicially. Consequently, where an action was brought against a local board to restrain the removal of posts erected on a public footpath by the owners of the adjoining property for the purpose of preventing the footpath from being used for vehicular traffic, and the statement of claim alleged that a member of the board had used his influence with the board for his own private interest, and that in consequence thereof he plaintiffs had failed to induce the board to take steps to prevent the user of the footpath for vehicular traffic:—

Held, that the real issue was whether or not the posts constituted an obstruction to the public right of way, and that the allegations in the statement of claim were irrelevant, and ought to be struck out. MURRAY *v.* EPSOM LOCAL BOARD Stirling J. 35

2. —— *Water—Statute—Construction—Limits of Water Supply—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 52—"*Constructing Waterworks*"—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 57—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 36, *sub-s.* 2—*Alteration of Boundaries.*

The name of a parish, as part of statutory limits of supply, *held* a geographical description not affected by a subsequent division of the parish or alterations of boundary.

The laying pipes by a local authority for the supply of water in a district added to their jurisdiction by order of a county council, as an extension of water supply in their old district:—

Held, not "constructing waterworks" within the meaning of s. 52 of the Public Health Act, 1875. HUDDERSFIELD CORPORATION *v.* RAVENSTHORPE URBAN DISTRICT COUNCIL North J. 652

LONDON—*Buildings—Party Structure Notice—Adjoining "Owner"—Possession of Premises under Building Agreement—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-ss.* 29, 32; *s.* 90.

The word "owner" in s. 5, sub-ss. 29 and 32, and in s. 90 of the London Building Act, 1894, as therein defined, includes a person who has entered upon land and erected buildings under an agreement for a lease, although no lease has been executed and although the agreement is expressed not to operate as a demise but to give only a right to enter upon the premises for the purpose of performing the agreement.

A person in that position is accordingly entitled as an "adjoining owner" to receive from an adjacent "building owner" the notice and particulars of proposed works required by s. 90 of the Act, and it is not sufficient to give notice to the intending lessor.

Injunction granted, in these circumstances, to restrain a building owner from proceeding with his works without the statutory notice to the intending lessee of the adjoining premises. LIST *v.* THARP - - - - Chitty J. 260

LONDON—*continued.*

—— Cost of sanitary works - - - 32
See TENANT FOR LIFE AND REMAINDERMAN. 1.

—— Vacant land—Deposit of filth by third parties - - - - 560
See NUISANCE.

LUNACY — *Payment out — Foreign Subject — Lunatic Ward of Foreign Court entitled to Fund in Court in this Country—Jurisdiction.*

An application was made by a lady who had been found a lunatic by the Royal Bavarian Court, and had been made a ward of that Court on that ground, by her next friend, who was a judge of that Court, that a fund standing to her credit in the Chancery Division and representing the share to which she was entitled under her parents' marriage settlement might be paid out to the deposit commission of the Bavarian Court. The deposit commission (which consisted of the above-mentioned judge and another official) was attached to the Court for the purpose of taking charge of the funds of its wards and of giving receipts for the same. The lunatic was the daughter of a German father and an English mother, and she and her nearest living relatives were domiciled German subjects:—

Held, that the Court had jurisdiction to make an order for payment out of the fund, and that the order ought to be made.

In re Barlow's Will, (1887) 36 Ch. D. 287, distinguished. *In re* DE LINDEN. *In re* SPURRIER'S SETTLEMENT. DE HAYN *v.* GARLAND Stirling J. 453

2. —— *Receiver in Lunacy—Pauper Lunatic—Guardians levying Distress—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 299.

Where a receiver in Lunacy of funds of a lunatic in a pauper asylum had been appointed, an injunction was granted to restrain the guardians from levying a distress against trustees of the fund to enforce a magisterial order for payment of the fund to the guardians.

Sub-s. 2 of s. 299 of the Lunacy Act, 1890, operates only as a discharge to trustees of a lunatic's property; and *In re Newbegin's Estate*, (1887) 36 Ch. D. 477, is not an authority that a magistrate's order under sub-s. 1 in respect of property in the hands of the trustees cannot be enforced. WINKLE *v.* BAILEY - North J. 123

MARRIAGE—Effect of—Severance—Lease 134
See JOINT TENANCY.

MARRIAGE SETTLEMENT.
See Cases under SETTLEMENT.

MEETINGS—Shareholders—Special resolution—Blanks in proxies - - - 1
See COMPANY. 5.

MEMORANDUM AND ARTICLES.
See COMPANY. 6, 7. 361, 434

METROPOLIS.
See LONDON.

MINE—*Mining Lease—Power to Distrain for Rent in arrear—Chattels of Lessee on adjoining*

MINE—*continued.*

Mine—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 6—*Registration of Lease—Company—Voluntary Winding-up — Distress — Receiver — Rights of Debenture-holders' Receiver.*

A mining company (now in liquidation) were lessees, from separate lessors, at certain rents and royalties, of two adjoining coal-mines A and B. There was no shaft on mine B, and the company worked both mines by means of a shaft on mine A. In each of the leases the lessor reserved to himself express power to distrain for rent in arrear, not only upon chattels belonging to the lessees on the demised premises, but also upon chattels belonging to the lessees in or about "any adjoining or neighbouring collieries." In October, 1896, the lessors of mine B levied a distress upon chattels belonging to the lessees on mine A:—

Held (reversing the decision of Stirling J.) (1.) that, having regard to the nature of the demise and the manner in which the minerals were worked, the power to distrain upon chattels belonging to the lessees upon adjoining or neighbouring mines did not constitute the mining lease a bill of sale within the meaning of the Bills of Sale Act, 1878, so as to require registration under the Bills of Sale Acts; and *Held* also (2.) that the distress, having been levied before the commencement of the winding-up of the company, and before a receiver was effectively appointed on behalf of the debenture-holders of the company, was valid against the debenture-holders.

Per the Court of Appeal: This last decision is in accordance with *Biggerstaff* v. *Rowatt's Wharf Co.*, [1896] 2 Ch. 93, and not inconsistent with *In re Opera, Limited*, [1891] 3 Ch. 260.

Per Stirling J.: The Court will not at the instance of the liquidator restrain further proceedings under a distress levied by the landlord of a limited company before the commencement of the winding-up, but not completed by sale, unless there are special reasons rendering it inequitable to allow the distress to go on; but *semble*, the Court has jurisdiction under the Companies Act, 1862, both in a compulsory and a voluntary winding-up, to restrain by injunction further proceedings under such distress.

The fact that a distress has been levied between the passing and confirmation of a special resolution for a voluntary winding-up is not a ground for such injunction.

The doctrine of *Tennent* v. *City of Glasgow Bank*, (1879) 4 App. Cas. 615, does not apply to a contest between different classes of creditors.

Pulbrook v. *Ashby*, (1887) 56 L. J. (Q.B.) 376, explained and approved by the Court of Appeal. *In re* Roundwood Colliery Company. Lee *v.* Roundwood Colliery Company - C. A. 373

—— Right to support—Working—Undertaking not to sue - - - - 725
See Canal.

MISFEASANCE—Auditor—"Officer" of company - - - - - 617
See Company. 14.

MISTAKE—Class—Gift void for uncertainty 75
See Will. 5.

MORTGAGE—*Foreclosure Action—Form of Judgment—Practice.*

In a foreclosure action in which a receiver of rents and profits had been appointed:—

Held, that the judgment ought to direct that in taking the account the plaintiff should be charged with the amount (if anything) paid into court by the receiver, and such a sum as should be in the receiver's hands at the date of the certificate, and with such a sum (if any) as the plaintiff should submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order for foreclosure absolute.

Form in Seton's Judgments, 5th ed. vol. iii. p. 2142, varied. Simmons *v.* Blandy North J. 19

—— Register of mortgages—Right to take copies. *See* Company. 12. 130

—— Trade premises—Engine—Hiring agreement - - - - - 182
See Fixtures.

—— Vesting declaration—New trustees - 642
See Trustee. 3.

MORTMAIN—Pure or impure personalty—Interest in land - - - - 928
See Charity. 1.

NATIONAL SCHOOL—*Trustees—Statutory Conveyance—Local Authority—Making up Street—Recovery of Expenses—"Owners"—"Charge"—Enforcing Charge—Sale—School Sites Act*, 1841 (4 & 5 *Vict. c.* 38), *ss.* 6, 10—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.

Under s. 6 of the School Sites Act, 1841, a piece of land was conveyed, in the form given in s. 10, to trustees for ever for the purposes of the Act, as a site for a national school, "and for no other purpose whatever"; and a national school was afterwards erected upon it. The local authority, under s. 150 of the Public Health Act, 1875, made up a street on part of which the school premises abutted, and served the trustees with notice under that Act to pay the apportioned expenses:—

Held (affirming Kekewich J.), that the trustees were liable for those expenses as "owners" within the Public Health Act, 1875, and that therefore the expenses were, until recovery thereof, a "charge" upon the premises under s. 257: but (reversing Kekewich J.) that the local authority could not enforce the charge by an order for sale of the school premises, since such an order would be in contravention of the School Sites Act, 1841.

Bowditch v. *Wakefield Local Board*, (1871) L. R. 6 Q. B. 567, followed. Hornsey District Council *v.* Smith - - - C. A. 843

NOTICE—Party structure notice—Adjoining owner - - - - 260
See London.

—— Service by post—Evidence - - 41
See Practice. 8.

—— Sufficiency of—Breach of covenant—Forfeiture - - - - 271
See Landlord and Tenant. 2.

—— Third party—Surviving partners - 110
See Practice. 10.

NUISANCE—*Vacant Land in Metropolis—Deposit of Filth by Third Parties—Continuing Nuisance—Common Law Duty of Landowner—Injunction—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 30, 35, 138, 141.

The defendant was the owner and occupier of a vacant piece of land in the metropolis. He had surrounded it by a hoarding, but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a continuing public nuisance. In an action by the Attorney-General at the relation of the vestry of the parish:—

Held, that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance; and that the Attorney-General was entitled to an injunction to enforce the performance of that duty. ATTORNEY-GENERAL *v.* TOD HEATLEY C. A. 560

OFFICER—Of company—Auditor—Misfeasance *See* COMPANY. 14. 617

OFFICIAL REFEREE—Taking accounts before—Practice - - - - 196
See FRAUDS, STATUTE OF.

OPTION—To purchase—Building agreement—Breach of conditions - - 937
See LANDLORD AND TENANT. 1.

OWNER—Street—Making up—Recovery of expenses - - - - 843
See NATIONAL SCHOOL.

PAROL EVIDENCE—Statute of Frauds—Purchase as trustee - - - 196
See FRAUDS, STATUTE OF.

PARTITION—*Practice—Action—Form of Judgment—Infants entitled to one undivided Third.*

Form of judgment in action for sale in lieu of partition, where infant plaintiffs are entitled to one undivided third, declaring infants, in event of a sale taking place, to be trustees for the purchaser, and directing conveyance by next friend. DAVIS *v.* INGRAM - - Kekewich J. 477

PARTNERSHIP—Surviving partners—Third party notice - - - - 110
See PRACTICE. 10.

PATENT—*Threat—Letter directed against Third Party—Injunction—Expired Patent—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

A company owned a patent for gas buoy lanterns that had expired, and also owned patents for improvements which were still running, and had for some years supplied B. with gas buoy lanterns made under the patents. B. having given D. an order for gas buoy lanterns, which were founded to some extent on the expired patent, the managing director of the company wrote B.: "I am much surprised at this. I am afraid that this matter will lead to a great deal of difficulty and unpleasantness, and you must not be surprised if my company applies for an injunction against D. to restrain him from selling his gas buoy lanterns":—

Held, that under the circumstances the letter

PATENT—*continued.*

was a threat within the meaning of s. 32 of the Patent Act, 1883, and that D. was accordingly entitled to an injunction against the company in the terms of the section. DOUGLASS *v.* PINTSCH'S PATENT LIGHTING COMPANY - Romer J. 176

PAYMENT OUT OF COURT—Foreign subject—Jurisdiction - - - - 453
See LUNACY. 1.

—— Wrong person—Solicitor—Replacement 213, 222, n.
See PRINCIPAL AND AGENT. 1, 2.

PENDENTE LITE—Right of creditor to sue administrator - - - - 866
See PROBATE.

PERSONALTY—Pure or impure—Mortmain
See CHARITY. 1. 928

POLICY—Renewal—New contract - - 459
See INSURANCE, ACCIDENT.

POOR LAW—*Guardians of the Poor—Loan for Term of Years—Redemption before End of Term—Consent of Lender—Poor Law Loans Act*, 1871 (34 & 35 *Vict. c.* 11), *s.* 2.

Held, by Lindley and Rigby L.JJ. (dissentiente A. L. Smith L.J.), that guardians of the poor who have, since April 24, 1871 (the date of the passing of the Poor Law Loans Act, 1871), borrowed money which, by their contract with the lender, is made repayable by equal half-yearly instalments extending over a fixed term of years, cannot, even with the authority of an order of the Local Government Board under s. 2 of the Act, compel the lender to accept against his will repayment of the loan otherwise than in accordance with the contract.

Decision of North J. reversed. GUARDIANS OF WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE SOCIETY. GUARDIANS OF WEST DERBY UNION *v.* PRIESTMAN - - C. A. 335

PORTION—Sale of heirlooms—Land purchased with proceeds - - - 712
See SETTLED LAND. 1.

PORTRAIT—"Distinctive device"—Registration - - - - - 71
See TRADE-MARK.

POST—Service by—Evidence—Notice - 41
See PRACTICE. 8.

POWER—*Appointment—Execution by Attorney—Evidence—Presumption—Deed more than Thirty Years old—Appointment under Special Power purporting to be executed by Attorney of Donee—Power of Attorney not produced.*

Where a deed, more than thirty years old, purports to be an appointment under a special power, and to be executed by the attorney of the donee of the power, although, by reason of the antiquity of the deed, the execution of it by the attorney as such ought to be presumed, yet there is no rule of law which requires or justifies the presumption by the Court that the attorney was duly authorized to execute the power.

Where, therefore, in support of such a deed, no power of attorney was produced, nor any evidence forthcoming as to the purport or contents of any such power, it was held that the title of

POWER—*continued.*
the appointees claiming under the deed was not made out. *In re* AIREY. AIREY *v.* STAPLETON
Kekewich J. 164

2. —— *Appointment—Succession Duty—Stock "sufficient to raise" a net sum.*
A tenant for life under a marriage settlement, in exercise of a power of appointment in favour of the children of the marriage, appointed so much of the stock held under the settlement as should be sufficient to raise the net sum of 2000*l.*:—
Held, that the appointee took subject to succession duty. *In re* SAUNDERS. SAUNDERS *v.* GORE - - - - - Stirling J. 888

—— Coupled with a trust—Power of disposition
See WILL. 4. 289

POWER OF ATTORNEY—Execution of—Presumption - - - - 164
See POWER. 1.

PRACTICE — *Costs — Administration Action — Order for Payment—Defaulting Trustee—Supplemental Order—Jurisdiction—Extravagant Litigation—Disallowance of Costs.*
Though the Court has no jurisdiction to alter or vary an order after it has been passed and entered, yet it may make a supplemental order; such as an order directing that the party benefited by the previous order shall not be entitled to receive any benefit under it except on certain conditions.
In an administration action an order was made in 1887 directing the trustees to raise a sum of taxed costs which they had incurred to their solicitor and to pay into court the amount when raised. The trustees raised the amount but, instead of paying it into court, allowed their solicitor to retain it in payment of his costs, although no order for actual payment had been made. In 1892 the trustees obtained orders directing certain further costs to be taxed and paid to them, and those orders were duly passed and entered; but before they had been acted upon Kekewich J. was informed of the default of the trustees under the order of 1887, and moreover that the taxed costs directed to be raised by that order amounted to about one-third of the value of the whole estate, and had mostly been incurred in fruitless and unnecessary proceedings carried out under the advice of the trustees' solicitor. He accordingly made an order supplemental to the orders of 1892, directing that, although the taxation of costs under those orders should be proceeded with, none of those costs should be paid to the trustees until they had first complied with the order of 1887. On appeal that supplemental order was affirmed.
Observations on the jurisdiction of the Court as to disallowing costs improperly incurred in an administration action.
Brown v. *Burdett*, (1887) 37 Ch. D. 207, discussed. *In re* SCOWBY. SCOWBY *v.* SCOWBY
C. A. 741

2. —— *Costs—Taxation—Client and Assignee, Application by — Bankruptcy of Client — Submission to Pay—Form of Order.*
The usual submission in an order for taxation of a solicitor's bill of costs to pay the solicitor

PRACTICE—*continued.*
what shall appear to be due to him on the taxation, must be made by the person or all the persons on whose application the order is made, whether the application is by the client alone or in conjunction with an assignee of all his interest under the taxation; the assignee being bound, as a condition of obtaining the order, to join in the submission even though the client is a bankrupt. *In re* BATTAMS & HUTCHINSON Kekewich J. 699

3. —— *Costs—Unauthorized use of Plaintiff's Name—Right of Defendants to apply for Payment of Costs by Solicitors.*
Where an action is brought in the name of a person as plaintiff without his authority, and he subsequently repudiates the action, the defendants, on application in the action, may obtain an order for payment of their costs by the solicitors who issued the writ.
So *held*, in a case where an infant was joined as co-plaintiff by solicitors on the assumption that he was of full age.
Fricker v. *Van Grutten*, [1896] 2 Ch. 649, considered and applied. GEILINGER *v.* GIBBS
Kekewich J. 479

4. —— *Discontinuance of Action—Jurisdiction—Unauthorized use of Plaintiff's Name—Motion to strike out Name—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 21—*Rules of Supreme Court*, 1883, *Order* XXVI., *r.* 1; *Order* LXXII., *r.* 2.
A company named as co-plaintiffs in an action served notice of motion to strike out their name, and asked that the solicitors who had issued the writ might be ordered to pay the company's costs, on the ground that their name had been used without their authority. Before the motion could be heard the solicitors served a notice wholly discontinuing the action:—
Held, that, notwithstanding the discontinuance, the Court had jurisdiction to make the order asked for. GOLD REEFS OF WESTERN AUSTRALIA, LIMITED *v.* DAWSON - North J. 115

5. —— *Discovery — Production of Books — Common Order—Liberty to Seal up irrelevant Entries—Form of Order giving Liberty to Cover up without Sealing.*
A party to an action, who has obtained against his opponent the common order for production and inspection of books and documents, giving liberty to the opponent to seal up such parts of the books as do not relate to the matters in question, is not entitled to insist upon the actual sealing up of such parts of the books where so doing would interfere with the conduct of the opponent's business or be oppressive; and the covering up upon oath of the irrelevant parts of such books is a sufficient compliance with the order. GRAHAM *v.* SUTTON, CARDEN & Co.
C. A. 761

6. —— *Discovery—Production of Documents —"Possession or Power"—Solicitor's Lien—Rules of Supreme Court*, 1883, *Order* XXXI., *r.* 12.
It is not an answer to an application for production of documents that they are in the hands of the respondent's former solicitors who claim a lien over them for costs and that he disputes the bill; but the order for production

PRACTICE—*continued.*

will contain liberty to apply in case he really cannot obtain the documents. Lewis *v.* Powell **Stirling J. 678**

7. —— *Receiver—Ejectment Action—Disputed Title—Defendant in Possession—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

In a pending action to recover possession of land, the Court has jurisdiction, under s. 25, sub-s. 8, of the Judicature Act, 1873, to appoint a receiver, although the title is legal and the defendant is in possession:—

Held, by the Court of Appeal, that a case must be made to justify such appointment, and an order for a receiver made by Kekewich J. was discharged as made on insufficient grounds. Foxwell *v.* Van Grutten - - **C. A. 64**

8. —— *Service—Notice—Service by Post—Evidence—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 267.

Under s. 267 of the Public Health Act, 1875, in order to prove service of a notice by letter through the post, it is necessary to shew that the letter was "prepaid," and an affidavit containing no statement to that effect is insufficient as evidence of service. Walthamstow Urban District Council *v.* Henwood - **Kekewich J. 41**

9. —— *Service out of the Jurisdiction—Scotland—Waiver—County Court Rules* 1889, *Order* LI., *r.* 23—*Rules of the Supreme Court*, 1883, *Order* XI., *rr.* 1 (*d*), 2—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 67, 68, 164—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 17.

Rule 23 of Order LI. of the County Court Rules, 1889, which relates to service out of the jurisdiction, though more extensive than any existing rule applicable to the High Court, is within the powers of making rules conferred by s. 164 of the County Courts Act, 1888.

Service having been effected in Scotland under Order LI., r. 23, of the County Court Rules, 1889, on a defendant in an administration action, the action was transferred to the High Court on the ground that the value of the estate exceeded the limit of the jurisdiction of the county court. The defendant answered interrogatories in the county court, but objected to the order for service both in the county court and the High Court:—

Held, that, though the order for service would have been valid if the action had remained in the county court, after the transfer, the question depended upon Order XI., rr. 1 (*d*) and 2, of the Rules of the Supreme Court, and that the defendant ought to have an opportunity of filing evidence as to the domicil of the testator, and as to whether there was an adequate concurrent jurisdiction in Scotland:

Held, further, that there had been no waiver by the defendant of the right to object to the service. Wood *v.* Middleton **Stirling J. 151**

10. —— *Third Party Notice—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 48—*Trustee—Breach of Trust—Firm of Solicitors—Surviving Partners—Indemnity.*

The defendant and A. were joint trustees of a settled fund, A. being a member of the firm of solicitors acting in the management of the trust. A. received the proceeds of sale of part of the trust funds as solicitor and misapplied them, and the moneys were lost. After the death of A. an action was commenced against the defendant as the surviving trustee claiming a declaration that he was liable to pay the plaintiff the sum so misapplied.

The defendant obtained an order under Order XVI., r. 48, for leave to serve a third party notice on the surviving partners of the firm of solicitors claiming to be indemnified against liability in the action:—

Held, on motion to discharge the order, that this was not a claim to indemnify the defendant against the plaintiff's claim in the action within Order XVI., r. 48, the right of the defendant to recover from the surviving partners a sum equal to the lost trust fund being an independent right and not one depending on the liability of the defendant in the action. Wynne *v.* Tempest **Chitty J. 110**

—— Accounts before Official Referee instead of in chambers - - - - **196**
See Frauds, Statute of.

—— Foreclosure action—Form of judgment **19**
See Mortgage.

—— Irrelevancy—Pleading—Striking out **35**
See Local Government. 1.

—— Partition action—Form of judgment **477**
See Partition.

PREACHING—Black gown in pulpit—Legality
See Ecclesiastical Law. **85**

PREFERENCE SHARES—Alteration of articles—Increase of capital - - **361**
See Company. 6.

PREFERENCE STOCK—Income tax imposed by colonial legislature - - **911**
See Company. 8.

PRESUMPTION—Deed more than thirty years old—Evidence - - - **164**
See Power. 1.

PRINCIPAL AND AGENT—*Fund in Court—Payment out to wrong Person—Fraud—Solicitor—Replacement of Lost Fund.* Slater *v.* Slater **Kay J. 222, n.**

2. —— *Fund in Court—Payment out to wrong Person—Fraud—Solicitor—Use of Name by uncertified Solicitor—Ratification—Solicitor Partner—Liability—Commissioners of Treasury—Replacement of Lost Fund—Court of Chancery (Funds) Act*, 1872 (35 & 36 *Vict. c.* 44), *s.* 5—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 10—*Form of Order.*

Where negligence or other breach of duty is committed by a solicitor in a matter of which the Court has seizin, the Court can summarily order the solicitor, as its officer, to make good the loss actually occasioned thereby, but cannot mulct him in damages for his misconduct.

To constitute a binding adoption or ratification of acts done without previous authority (1.) the acts must have been done for, and in the name of, the supposed principal; and (2.) full knowledge of them, and unequivocal adoption after knowledge, must be proved; or else, the circumstances must warrant the clear inference

PRINCIPAL AND AGENT—*continued.*

that the principal was adopting the acts of his supposed agent whatever their nature or culpability.

Without the knowledge or authority of X., a solicitor, A. B., another solicitor, used X.'s name in proceedings, wherein by acts of fraud and forgery, A. B. obtained an order for the payment out of a fund in court, and was thereby enabled to get the fund paid out by a cheque from the Paymaster-General, with which he opened a fictitious account at a bank. Two days later, and after the account had been partially drawn upon, X. was told by A. B. that his name had been made use of for a formal party. X. reprimanded A. B. for this, but, without inquiring into the nature of the business, accompanied A. B. to the Paymaster-General's Office, and received a cheque for 15*l.* for costs; over 10*l.* of this he paid to A. B. for out of pocket expenses, and the balance of 4*l.* 5*s.* 6*d.* he handed to his partner Y., who entered it to the credit of the firm in their books without knowing anything of the circumstances under which the money had been paid.

A large portion of the fund formerly in court having been lost:—

Held, (1.) that, even if X. had previously authorised the use of his name for a formal party, he would not have been responsible for the acts of fraud and forgery committed by his supposed agent for that agent's own fraudulent purposes; (2.) that, under the circumstances, X. had not condoned or ratified the use of his name by A. B., and was not liable for the whole of the loss sustained, but only for the amount of the 15*l.* cheque which he took; and (3.) that Y. was liable only for the 4*l.* 5*s.* 6*d.* received by him for the partnership.

Form of order for making good a loss occasioned to the Consolidated Fund under the Court of Chancery (Funds) Act, 1872, s. 5, through payment of a fund out of court to the wrong person.

The order of Kekewich J. varied. MARSH *v.* JOSEPH - - - - - - C. A. 213

3. —— *Sale by Auction of Real Estate—Implied Agency of Auctioneer — Memorandum of Contract — Signature by Auctioneer's Clerk on behalf of Purchaser — Revocation — Statute of Frauds.*

The authority of an auctioneer, upon a sale by auction of real estate, to sign a memorandum of the contract as agent for the purchaser does not extend to the auctioneer's clerk. Such a memorandum, in order to bind the purchaser, must be signed by the auctioneer himself and at the time of the sale, unless the purchaser has, by word, sign, or otherwise, authorized the clerk to sign as his agent.

Where the auctioneer had signed a memorandum as agent for the purchaser a week after the sale, and the purchaser had repudiated the purchase at the time:—

Held, that the auctioneer's authority had ceased, and that there was no memorandum in writing sufficient to satisfy the requirements of the Statute of Frauds. BELL *v.* BALLS Stirling J. 663

PRINCIPAL AND AGENT—*continued.*

—— Authority to apply for shares — Underwriting letter - - - 575
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PRIORITY—Crown, specialty, and simple contract debts—Insolvent estate - 673
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PROBATE—*Practice—Right of Creditor to Sue Administrator—Will—Action touching Validity—Appointment of Administrator pendente lite—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 70.

An administrator pendente lite of the personal estate of a deceased person, appointed by the Probate Division, under s. 70 of the Court of Probate Act of 1857, pending an action touching the validity of the will of the deceased, may, without any leave of the Court, be sued in the Chancery Division by a creditor of the deceased in the same way as a general administrator. *In re* TOLEMAN. WESTWOOD *v.* BOOKER North J. 866

PRODUCTION OF DOCUMENTS — Discovery — Sealing up irrelevant entries - 761
See PRACTICE. 5.

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PROXY—Meeting of shareholders—Special resolution—Blanks in proxies - 1
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PUBLIC HEALTH (LONDON)—Cost of sanitary works - - - - 32
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—— Notice—Service by post—Evidence - 41
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PUBLIC-HOUSE—Agreement for sale—Transfer of licence—Interim protection - 705
See VENDOR AND PURCHASER. 2.

PUBLISHER — Publishing agreement — Assignability—Author's consent - - 21
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PURCHASE—Option to—Building agreement—Breach of conditions - - - 937
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PURCHASER.
See Cases under VENDOR AND PURCHASER.

RAILWAY—*Judgment against Railway Company—Execution—"Action on a Contract"—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.

The M.-W. Railway Company and the M. Railway Company were each of them authorized to make a separate line in a certain district to a point of junction with an existing railway belonging to the L. Company. In order to save expense the three companies in 1861 entered into an agreement whereby the L. Company was to make a joint line to be used by the other two companies, and a joint station to be used by the three companies. This arrangement was em-

RAILWAY—*continued.*
bodied and carried into effect by an Act of Parliament passed in 1862, which contained provisions for the payment of certain sums to the L. Company by the two other companies, and for the recovery of those sums by action in case of default. The works were duly executed by the L. Company. The M. Company from time to time made default in their payments; and the L. Company in 1883 and at subsequent dates obtained various judgments against them, which were unsatisfied.

Upon an application by the L. Company for leave to issue execution upon the rolling-stock of the M. Company:—

Held, that the actions in which the judgments had been recovered were not "actions on a contract" within the meaning of s. 4 of the Railway Companies Act, 1867, and that consequently the applicants were not entitled to issue execution.

The observations of Lord Watson in *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners*, (1882) 7 App. Cas. at p. 707, commented on and explained. *In re* MANCHESTER AND MILFORD RAILWAY COMPANY **Stirling J. 276**

RATE—Covenant to pay—Water supplied for trade purposes - - - 633
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REBUILDING—Expenditure of money in—Jurisdiction - - - - 685
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RECEIVER — Appointment — Debenture not actually due - - - 158
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—— Appointment of—Rescission of agreement
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—— Ejectment action — Disputed title — Defendant in possession - - 64
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—— Pauper lunatic—Guardians levying distress
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REFEREE—Taking accounts before Official—Practice - - - - 196
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REFERENTIAL TRUSTS—Hotchpot—Two funds
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—— Rectification — Underwriting letter — Estoppel - - - - 575
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REMAINDERMAN.
See Cases under TENANT FOR LIFE AND REMAINDERMAN.

REPAIRS—Outgoings—Corpus or income 876
See TENANT FOR LIFE AND REMAINDERMAN. 2.

RESCISSION—Agreement—Appointment of receiver - - - - 266
See VENDOR AND PURCHASER. 3.

RESIDUARY GIFT—Successive interests—Leaseholds—Conversion - - 881
See WILL. 1.

REVENUE—*Account Stamp Duty—Incidence—Gift within Twelve Months before Death of Donor—Residuary Estate and Donee—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *ss.* 38, 39—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-s.* 1.

Under the Customs and Inland Revenue Acts, 1881 and 1889, account stamp duty in respect of property given by a deceased person, within twelve months before his death, to another, is payable by the donee personally and not out of the estate of the deceased. *In re* FOSTER. THOMAS *v.* FOSTER - - **Kekewich J. 484**

2. —— *Estate Duty — Settlement — Appropriated Funds—Residue—Debt on Incumbrance—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*a*); *s.* 6, *sub-s.* 2; *s.* 7, *sub-s.* 1; *s.* 8, *sub-ss.* 3, 4; *s.* 9, *sub-ss.* 1, 4, 5; *s.* 14, *sub-s.* 1.

By a post-nuptial settlement personal property was settled in the events that happened upon trust for the settlor for life, and after his death upon trust that the trustees should appropriate funds of a specified value to be held upon the trusts thereinafter declared for the benefit of two of the settlor's daughters and their issue, and should stand possessed of the residue of the trust premises in trust for the settlor, his executors, administrators, and assigns:—

Held, that the appropriated funds were not voluntary incumbrances within s. 7, sub-s. 1, of the Finance Act, 1894, upon property passing to the executor as such of the deceased (in which case the estate duty on the entire funds would have had to be borne exclusively by the settlor's residuary legatee), but that the provisions contained in the settlement with regard to those funds amounted to substantive settlements thereof, and that the estate duty was payable rateably out of the appropriated funds and the residue according to their respective values. *In re* MEYRICK. MEYRICK *v.* HARGREAVES
Chitty J. 99

REVOCATION—Signature of auctioneer's clerk—Statute of Frauds - - - 663
See PRINCIPAL AND AGENT. 3.

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RULES OF SUPREME COURT:—
—— Order XI., rr. 1 (*d*), 2 (Service out of the jurisdiction) - - - 151
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SCHOOL SITES ACT, 1841—"Owners"—Street—Recovery of expenses - - 843
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SEALING UP—Irrelevant entries—Production of books—Discovery - - - 761
See PRACTICE. 5.

SERVICE—By post—Notice—Evidence - 41
See PRACTICE. 8.
—— Out of jurisdiction—Waiver - - 151
See PRACTICE. 9.

SETTLED LAND — *Heirlooms — Settlement of Chattels as—Land charged with Jointures and Portions—Sale of Heirlooms—Vendor and Purchaser—Land purchased with Proceeds—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* 7; *s.* 22, *sub-ss.* 5, 7; *s.* 24, *sub-ss.* 2, 4, 5; *s.* 37.

Where land is settled and chattels are also settled to devolve with the land as heirlooms, the settled land being charged with jointures and portions for younger children, on a sale of the heirlooms under s. 37 of the Settled Land Act, 1882, and the investment of the proceeds in land, the land so purchased is not subject to the charges created by the settlement affecting the land settled.

In re Duke of Marlborough's Settlement, (1886) 32 Ch. D. 1, observed upon. *In re* DUKE OF MARLBOROUGH AND GOVERNORS OF QUEEN ANNE'S BOUNTY - - - - Romer J. 712

2. —— *Lease for Term of Years—Receipt of Bribe from Lessee—Invalidity of Lease—"Best Rent"—Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 7, *sub-s.* 2, 22, 45 *sub-s.* 3, 53, 54—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 4—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 3, 7.

C., tenant for life of a freehold house, who had mortgaged his life interest, in 1892 granted to the defendant a lease of the premises for seven years in consideration of a yearly rent of 25*l.* and covenants by the lessee to execute certain repairs and improvements. As an inducement to execute the deed the defendant had paid to C. the sum of 21*l.*, which he applied to his own use. There was no evidence that a higher rent could have been obtained. The lease purported to be granted by the mortgagees at the request of C. and by C., as tenant for life, by virtue of the Settled Land Act, 1882. C. died in 1895. In an action to set aside the lease:—

Held, (1.) that the Court, in giving relief to the beneficiaries, would not consider the question whether they had been damnified or not; (2.) that on the evidence the payment to C. could not be regarded as a fine, and the liability of the defendant was not therefore limited to paying the sum over again to trustees appointed for the purposes of the Settled Land Acts; and (3.) that, having regard to the improper payment to C., the "best rent" required by s. 7, sub-s. 2, of the Settled Land Act, 1882, had not been obtained, and consequently the lease was void. CHANDLER *v.* BRADLEY - - - Stirling J. 315

3. —— *Rebuilding — Expenditure of Money in—Jurisdiction—Settled Land Acts.*

The Court has no jurisdiction, in cases not amounting to salvage, to spend settled money in pulling down and rebuilding houses on settled land.

Where settled land was vested in trustees upon trust for infants, and it appeared that if the houses on the land, which were old, were pulled down and others erected in their place, the value of the property would be largely increased both for letting and selling, and that there was no money fund available to defray the expense of rebuilding, but it did not appear that the proposed expenditure was necessary by way of salvage, an application by the trustees for leave to raise money by mortgage of the land was refused on the ground of want of jurisdiction.

Conway v. *Fenton*, (1888) 40 Ch. D. 512, considered and distinguished.

The general jurisdiction of the Court touching the expenditure of money on land is not ousted by the Settled Land Acts. *In re* MONTAGU. DERBISHIRE *v.* MONTAGU - Kekewich J. 685

4. —— *Trustees—Appointment of Colonial Trustees—Infant Beneficiary—Sale of Settled Land—Form of Order—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 8; *ss.* 38, 59, 60—*Rules under the Settled Land Act*, 1882, *Appendix, Form xix.*

Where an infant domiciled in Australia was entitled under a will to a small share of real property in this country which the co-owners proposed to sell, and in order to effectuate the sale of the infant's interest it was necessary to apply to the Court for the appointment of trustees under the Settled Land Act, 1882, the Court, upon proof that the sale was for the benefit of the infant, appointed two persons domiciled in Australia trustees of the settlement effected by the will for the purposes of the Act.

The form of order in *In re Wright's Trusts*, (1883) 24 Ch. D. 662, followed. *In re* SIMPSON. *In re* WHITCHURCH - - - C. A. 256

SETTLED LAND ACT, 1882, RULES—Appendix, Form xix. - - - - 256
See SETTLED LAND. 4.

SETTLEMENT—*Covenant to settle Wife's other and after-acquired Property—Income—Accumula-*

SETTLEMENT—*continued.*

tions—Investment by Wife of Accumulations—Marriage Settlement.

If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is invested by the wife during the coverture, the investments so made do not become subject to the covenant.

Lewis v. *Madocks*, (1803) 8 Ves. 150, (1810) 17 Ves. 48, considered.

In re Bendy, [1895] 1 Ch. 109, discussed and not followed. FINLAY *v.* DARLING **Romer J. 719**

2. —— *Hotchpot — Two Funds — Referential Trusts.*

A marriage settlement dealt with two funds: 13,000*l.* Consols belonging to the wife, and a policy for 5000*l.* on the life of the husband. The capital of the wife's fund was to go to such children of the marriage as the husband and wife by deed, or the survivor by deed or will, should appoint, and in default of appointment to the children equally, subject to a hotchpot clause in the form usually adopted in the case of one fund: the 5000*l.* policy moneys were to go to such children of the marriage as the wife should by deed or will appoint, and in default of appointment "upon the same or the like trusts," and subject to "the same or the like" powers and provisoes as were expressed in the said settlement concerning the wife's fund after the death of the husband and wife and in default of appointment. The whole of the 13,000*l.* had been appointed unequally among the three children of the marriage, the 5000*l.* was unappointed, and the question now raised was whether the two sums were to be aggregated for the purposes of hotchpot, or whether the 5000*l.* was divisible into three equal shares:—

Held, that the two funds were distinct, and that the three children were entitled to the 5000*l.* in equal shares, without having to account for or bring into hotchpot any sums appointed to them out of the 13,000*l.* *In re* MARQUIS OF BRISTOL. EARL GREY *v.* GREY - - **Romer J. 946**

3. —— *Trust for Payment of Debts—Unnamed Creditors—Agency—Revocable Trust—Death of Settlor—Liability of Estate—Charge of Debts.*

By a deed of "family arrangement" executed in 1867 on the resettlement of an estate by father and son, the estate was limited to the use of the father for life, with remainder to the use of trustees, upon trust, with the consent of the father and son during their joint lives, or of the survivor during his life, and after the death of the survivor at the discretion of the trustees, to sell the same and apply the proceeds, and also the rents and profits until sale, in payment, in such order and in such manner as the trustees should, with the concurrence of the father during his lifetime, determine, of all debts owing by the father; and subject thereto to hold any unsold hereditaments to the uses of an indenture of even date under which the father and son were successive tenants for life with remainder to an infant son of the son in tail. The father's creditors were neither parties to nor named in the deed, nor was it ever communicated to them. After the father's death the trustees sold part of the settled estate with the consent of the son, and

SETTLEMENT—*continued.*

applied the proceeds in payment of all the father's debts, except one due to a sister, of which the trustees were unaware. In 1889 the trustees, with the concurrence of the son, who was his father's legal personal representative, conveyed the unsold hereditaments to the uses of the second indenture of 1867. The son died in 1890. In 1896 the executors of the sister, who had died, having become aware of the deeds of 1867 and 1889, brought an action seeking to charge the hereditaments in the possession of the infant tenant in tail with the debt due to the sister's estate:—

Held, that the case fell within the principle of *Synnot* v. *Simpson*, (1854) 5 H. L. C. 121, and not within that of *Garrard* v. *Lord Lauderdale*, (1831) 2 Russ. & My. 451, and that the infant tenant in tail took the estate subject to the liability for the debt. PRIESTLEY *v.* ELLIS **Kekewich J. 489**

—— Estate duty—Appropriated funds—Residue *See* REVENUE. 2. **99**

—— Possessory title—Rights of remaindermen *See* ESTOPPEL. **440**

—— Voluntary—Bonâ fide purchaser for value—Title - - - - - **776**
See VENDOR AND PURCHASER. 4.

SEVERANCE—Costs—Administration action—Right of appeal - - - **251**
See TRUSTEE. 2.

—— Effect of marriage—Lease - - **134**
See JOINT TENANCY.

SHARES—Of company.
See Cases under COMPANY.

SIGNATURE—Auctioneer's clerk—Statute of Frauds - - - - **663**
See PRINCIPAL AND AGENT. 3.

SOLICITOR—*Costs—Taxation—Country Solicitor and London Agent—Charges of London Agent—Solicitor and Client—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

Where a country solicitor employs a London agent he ought to incorporate in his bill of costs the details of the charges of the London agent, and until the details of such charges are stated, either in the original or a supplemental bill, there is no complete bill capable of taxation so as to entitle the solicitor to rely upon its delivery for twelve months as a ground for refusing taxation. *In re* POMEROY & TANNER - - **Stirling J. 284**

2. —— *Costs—Taxation—Interest—Administration Action—"Person liable"—General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *r.* 7.

The legal personal representative of a deceased client is the proper person from whom to demand payment of a bill of costs as the person liable, so as to make the costs carry interest.

In the administration by the Court of an insolvent estate, a bill of costs due from the deceased had been delivered, by direction of the chief clerk, to the solicitor of a creditor having the conduct of the cause:—

Held, that there had been no demand for payment on the person liable, and that the costs

SOLICITOR—*continued.*
did not carry interest. *In re* McMURDO. PENFIELD *v.* McMURDO - - - North J. 119

3. —— *Costs—Taxation—Lease—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order thereunder, Sched. I., Part II., Scale of Charges.*

In the case of leases at a rack-rent to which the scale of charges in Sched. I., Part II., of the General Order under the Solicitors' Remuneration Act, 1881, is applicable, the solicitor of the lessor is not entitled, where the annual rent exceeds 100*l.*, to charge any percentage on fractional amounts of 100*l.* in the rental. *In re* McGAREL (A LUNATIC) - - - - C. A. 400

4. —— *Costs—Taxation—Underlease—Sale by auction of leaseholds—Scale charge—General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *Sched. I., Part I., r.* 8; *Part II., r.* 5.

Leasehold property held with other property under one lease was sold by auction subject to a condition that the purchaser should accept an underlease for the whole of the unexpired term less three days at an apportioned ground-rent. The vendors' solicitors by virtue of rule 5 of Part II. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, claimed to be entitled to a scale charge in respect of the price and to a further scale charge in respect of the rent:—

Held, that the transaction though carried out by an underlease was in fact a sale, and that the solicitors were not entitled to a charge in respect of the rent; but *quære* whether this was not business not provided for by Sched. I., and therefore to be charged for according to the old system as modified by Sched. II. *In re* WEBB. STILL *v.* WEBB - - - Stirling J. 144

—— Cheque—Tender—Validity - - 171
See TENDER.

—— Costs—Unauthorized use of plaintiff's name
See PRACTICE. 3. 479

—— Fund in Court—Payment out to wrong person—Replacement - - 213, 222, n.
See PRINCIPAL AND AGENT. 1, 2.

—— Liability to indemnify co-trustee—Breach of trust - - - - 536
See TRUSTEE. 1.

—— Lien—Production of documents - 678
See PRACTICE. 6.

SOLICITORS' REMUNERATION ORDER:—
—— r. 7 - - - - - 119
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—— Sched. I., Pt. I., r. 8; Pt. II., r. 5 - 144
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SPECIALTY DEBT—Priority—Crown debt—Simple contract debt - - 673
See ADMINISTRATION.

STAMP—Blanks in proxies—Meeting of shareholders - - - - - 1
See COMPANY. 5.

STAMP DUTY—Account—Residuary estate and donee - - - - 484
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—— Apportionment of value—Issue of shares at a discount - - - - 796
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STATUTE—Construction—Alteration of boundaries—"Constructing waterworks" 652
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29 Car. 2, c. 3—*Frauds* - - - 663
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9 Geo. 4, c. 61, ss. 4, 11, 14—*Licensing* - 705
See VENDOR AND PURCHASER. 2.

3 & 4 Will. 4, c. 42, s. 2—*Limitation of time*
See LIGHT. 694

2 & 3 Vict. c. 54—*Infants* - - 786
See INFANT.

4 & 5 Vict. c. 38, ss. 6, 10—*School Sites* 843
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5 & 6 Vict. c. 44, s. 1—*Licensing* - 705
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5 & 6 Vict. c. 45, s. 13—*Copyright* - 465
See COPYRIGHT.

6 & 7 Vict. c. 73, s. 37—*Solicitors* - 284
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10 & 11 Vict. c. 17—*Waterworks Clauses* 633
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15 & 16 Vict. c. clx., ss. 36, 38, 40—*New River Company* - - - - 633
See WATER RATE.

20 & 21 Vict. c. 77, s. 70—*Probate* - 866
See PROBATE.

25 & 26 Vict. c. 68, ss. 1, 4—*Copyright* - 465
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25 & 26 Vict. c. 89, ss. 38, 131, 133, 153—*Companies* - - - - 298
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30 & 31 Vict. c. 127, s. 4—*Railways* - 276
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30 & 31 Vict. c. 131, ss. 13, 14—*Companies*
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32 & 33 Vict. c. 46—*Debts* - - 673
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32 & 33 Vict. c. 71, s. 49—*Bankruptcy* - 196
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34 & 35 Vict. c. 11, s. 2—*Poor—Guardians* 335
See POOR LAW.

35 & 36 Vict. c. 44, s. 5—*Chancery (Funds)*
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36 & 37 Vict. c. 66, s. 25, sub-s. 8—*Judicature*
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38 & 39 Vict. c. 55, ss. 4, 150, 257—*Public Health* - - - - 843
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38 & 39 Vict. c. 77, s. 17—*Judicature* - 151
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TENANT FOR LIFE AND REMAINDERMAN—*continued.*

tal or Income—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 121, 141.

The cost of sanitary works executed under the Public Health (London) Act, 1891, upon leasehold houses forming part of a residuary bequest to trustees upon trust for tenant for life and remaindermen:—

Held, payable out of the capital of the residuary estate. *In re* LEVER. CORDWELL *v.* LEVER **Stirling J. 32**

2. —— *Leaseholds—Ground-rents — Repairs and Outgoings—Corpus or Income—Construction of Will.*

Testator directed his executors and trustees to arrange his affairs and manage his estate, and to retain certain leaseholds and let them on lease at fair rentals, and pay the income derived therefrom to his wife for life for the benefit of herself and her children, and after her decease to divide the whole of his estate equally between his children:—

Held, on the construction of the will, that the "income derived" from the leaseholds meant the net income, i.e., the amount of the rents after deducting all proper outgoings, and that consequently ground-rents, current repairs, and other outgoings in respect of the leaseholds must be borne by the tenant for life.

The view taken in *In re Baring*, [1893] 1 Ch. 61, of the decision in *In re Courtier*, (1886) 34 Ch. D. 136, dissented from. *In re* REDDING. THOMPSON *v.* REDDING - **Stirling J. 876**

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TENDER—*Validity—Cheque—Authority of Solicitor.*

A solicitor who is authorized to accept a tender of mortgage money on behalf of his client is not at liberty to accept a banker's cheque, and tender of a cheque by the mortgagor to the solicitor is accordingly insufficient. BLUMBERG *v.* LIFE INTERESTS AND REVERSIONARY SECURITIES CORPORATION - - - - **Kekewich J. 171**

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TRADE-MARK — *Registration — Removal from Register — Proper Subject-matter — "Distinctive Device" — Portrait of Manufacturer — Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1 (*c*).

The portrait of the manufacturer of goods is a "distinctive device" within the meaning of s. 10, sub-s. 1 (*c*), of the Patents, Designs, and Trade Marks Act, 1888, and may properly be registered as a trade-mark to be used by him in connection with his goods.

In re Anderson's Trade-mark, (1884) 26 Ch. D. 409, explained. ROWLAND *v.* MITCHELL. *In re* ROWLAND'S TRADE-MARK - - **C. A. 71**

—— Evidence of intent to deceive—Admissibility
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TRADE NAME—*Injunction—Trade-mark—Rival Traders—Passing off—Deception—Intent to Deceive — Evidence of Intent—Admissibility — Account of Profits, Form of.*

The principle that "nobody has any right to represent his goods as the goods of somebody else," *Reddaway* v. *Banham*, [1896] A. C. 199, 204, has no limit as regards name, origin, honesty of manufacture or sale, or otherwise. Thus, a trader whose goods have acquired a reputation under a particular name can restrain the user of that name in any way whatever by a rival trader in connection with the latter's own goods, even though that reputation has been acquired by the exertions or enterprise of the rival trader as an importer and vendor on behalf of the plaintiff.

In an action for an injunction to restrain the use of a trade name, if the defendant's goods, on the face of them and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts; but if, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then evidence of intention to deceive is admissible, and this evidence may be supplied by admissions, oral or in writing, or by inference from conduct.

Reddaway v. *Banham*, [1896] A. C. 199, discussed.

Where an injunction was granted restraining the defendants from passing off their goods under the plaintiff's trade name, an account of profits was directed, as a necessary consequence, in the form allowed in *Lever* v. *Goodwin*, (1887) 36 Ch. D. 1; 4 Rep. Pat. Cas. 492, although there was no evidence that the defendants' goods had been actually mistaken for the plaintiff's. SAXLEHNER *v.* APOLLINARIS COMPANY **Kekewich J. 893**

TRANSFER—Licence — Agreement for sale of public-house - - - **705**
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—— Shares—Contributory - - - **298**
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TRUST—For payment of debts—Liability of estate - - - - **489**
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TRUSTEE—*Breach of Trust—Court's Power to Excuse—Solicitor-Trustee—Liability to Indemnify co-Trustee—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

The power to relieve a trustee from personal liability for a breach of trust given by s. 3 of the Judicial Trustees Act, 1896, is meant to be acted on freely and fairly in the exercise of judicial discretion, but the Court must, before exercising

TRUSTEE—*continued.*

the power, be satisfied by sufficient evidence that the trustee acted reasonably as well as honestly.

No general rules or principles can be laid down as those to be acted upon in carrying out the section: each case depends on its own circumstances.

Where two trustees appointed by a testatrix, one being a solicitor and the other a linendraper, invested trust money on a mortgage which was an improper investment both as to its nature and as to its value, the Court refused to excuse the linendraper when it was not satisfied that he had acted with the care which he would probably have taken if the money had been his own, but found that he had relied on the solicitor. The Court, however, following *Lockhart* v. *Reilly*, (1856) 25 L. J. (Ch.) 697, ordered the solicitor to indemnify his co-trustee from the loss resulting from his negligence. *In re* TURNER. BARKER *v.* IVIMEY - - - - **Byrne J. 536**

2. —— *Costs—Severance in Defence—Administration Action—Practice—Apportionment of Costs—Right of Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Rules of Supreme Court*, 1883, *Order LXV., r.* 1.

A trustee ought not to be deprived of his costs out of the trust estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate.

He ought to have an opportunity of explaining the reasons for his severance, so that the Court may be able to decide judicially whether the severance was improper.

The allowance of the costs of a trustee out of the trust estate is not a matter "left to the discretion of the Court" within the meaning of s. 49 of the Judicature Act, 1873; and consequently a trustee has a right to appeal against an order depriving him of costs out of the estate, and giving the whole of the costs to his co-trustee.

Decision of Kekewich J. reversed. *In re* ISAAC. CRONBACH *v.* ISAAC - - **C. A. 251**

3. —— *Vesting Declaration—New Trustees—"Trustees for performing the Trust"—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 12, *sub-s.* 1.

A mortgagor of land by deposit of deeds declared himself trustee of the legal estate for the mortgagee:—

Held, that new trustees appointed in lieu of the mortgagor by the mortgagee were "trustees for performing the trust" within the meaning of s. 12, sub-s. 1, of the Trustee Act, 1893.

The mortgagor conveyed the fee to a subsequent incumbrancer with notice of the prior mortgage:

Held, that a vesting declaration in the deed appointing new trustees operated to vest the legal estate in them. LONDON AND COUNTY BANKING COMPANY *v.* GODDARD - - **North J. 642**

—— Appointment of colonial trustees—Form of order - - - - - **256**
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VENDOR AND PURCHASER—*Building Estate—Owner of two Tenements—Purchase of one Tenement—Conveyance—General Words—Light—Implied Grant—Derogating from Grant—"Building Land"—"Contrary Intention"—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4.

In 1896 the defendant, the owner of building land, sold and conveyed part of it, as "beneficial owner," without any express general words, to the plaintiff. The conveyance included a house on the land conveyed which had been built by the defendant with windows overlooking the land retained by him and referred to in the conveyance and the plan thereon as "building land," but the conveyance contained no express reservation to the defendant of any right to build on that land. The defendant subsequently built on that land a house so close to the plaintiff's as to interfere with the access of light to his windows:—

Held, that by s. 6, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, the conveyance included all light enjoyed with the house, and that the reference in the conveyance and plan to the adjoining land as "building land" was insufficient to shew a "contrary intention" within sub-s. 4: and that, on the principle that a grantor cannot derogate from his own grant, the plaintiff had primâ facie an unrestricted right to light as against the defendant, and the burden of setting limits to that right lay on the defendant. And on proof by the defendant that this primâ facie right was restricted by the plaintiff's own admission that he would have been satisfied if the defendant's house had been set back to a certain distance, an inquiry was directed what damages the plaintiff had sustained by reason of the obstruction of light to his windows occasioned by the defendant's house not being so set back.

Swansborough v. *Coventry*, (1832) 2 Moo. & Sc. 362; 9 Bing. 305, approved of.

Birmingham, Dudley and District Banking

VENDOR AND PURCHASER—*continued.*

Co. v. *Ross*, (1888) 38 Ch. D. 295, and *Myers* v. *Catterson*, (1889) 43 Ch. D. 470, discussed and explained. BROOMFIELD *v.* WILLIAMS **C. A. 602**

2. —— *Public-house—Agreement for Sale—Transfer of Licence—Interim Protection—Licence "Indorsed or otherwise affected"—Specific Performance—9 Geo. 4, c. 61, ss. 4, 11, 14—5 & 6 Vict. c. 44, s. 1.*

A contract for the sale and purchase of a licensed public-house, not containing any special undertaking by the vendor that the licence shall be renewed at the Brewster Sessions, or that he will obtain from the magistrates a transfer of the licence to the purchaser's nominee at the next special sessions, or interim authority for that nominee to use the licence between the date fixed for completion and the next special sessions, does not bind the vendor to free the purchaser from risk in respect of any of the above-mentioned matters. The vendor is bound only to have a valid and effectual licence existing at the date fixed for completion which he can indorse in the usual way, and upon or in respect of which the purchaser can apply at once for interim protection under s. 1 of 5 & 6 Vict. c. 44, at the next special sessions.

The statement in Dart's Vendors and Purchasers, 6th ed. vol. i. p. 483, that "if the vendor cannot, by the day appointed for the completion of the purchase, procure a transfer of the licence under the Licensing Act, the purchaser may repudiate the contract," is too wide.

Day v. *Luhke*, (1868) L. R. 5 Eq. 336; *Claydon* v. *Green*, (1868) L. R. 3 C. P. 511, and *Cowles* v. *Gale*, (1871) L. R. 7 Ch. 12, observed upon. TADCASTER TOWER BREWERY COMPANY *v.* WILSON **Romer J. 705**

3. —— *Rescission—Purchaser let into Possession before Completion—Failure to pay Moneys due under Agreement—Action by Vendor for Rescission of Agreement—Motion that Purchaser give up Possession in Default of making Payments due under Agreement—Appointment of Receiver.*

An agreement for the sale of a leasehold interest in land provided that possession should be given to the purchaser on payment of a specified part of the purchase-money, he undertaking to pay the rent and other outgoings, and also, on taking possession, paying to the vendor the cost of a new fence. The specified part of the purchase-money having been paid, the purchaser was let into possession, but he failed to pay the cost of the fence and did not pay the rent and taxes, so that the vendor had to pay them in order to prevent the forfeiture of the lease. The vendor commenced an action for rescission of the agreement on the ground that he had been induced to enter into it by misrepresentation, and moved in the action for an order on the defendant to deliver up possession of the land in default of his making the payments due under the agreement:—

Held, that the motion, seeking in effect the specific performance of some of the terms of the agreement, was inconsistent with the claim for rescission made by the writ, and must therefore be refused.

But a receiver was appointed for the purpose of securing the payments in question. COOK *v.* ANDREWS - - - - **North J. 266**

4. —— *Voluntary Settlement — Trustee in Bankruptcy of Settlor—Bonâ fide Purchaser for Value—Title—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47; *s.* 48, *sub-s.* 2.

According to the true construction of s. 47 of the Bankruptcy Act, 1883, a voluntary settlement is not void against the settlor's trustee in bankruptcy from its date, but is only void against the trustee from the time when his title accrues; so that if before that time the property comprised in the settlement has been sold, bonâ fide, to a purchaser for value, the title of the purchaser will be good as against the trustee.

In re Brall, [1893] 2 Q. B. 381, and *In re Holden*, (1887) 20 Q. B. D. 43, approved.

In re Briggs and Spicer, [1891] 2 Ch. 127, overruled. *In re* CARTER AND KENDERINE'S CONTRACT - - - - - **C. A. 776**

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VESTING DECLARATION — New Trustees — "Trustees for performing the trust"—Mortgage - - - - **642**
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VOLUNTARY SETTLEMENT—Bonâ fide purchaser for value—Title - - **776**
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WAIVER—Service out of the jurisdiction—Scotland - - - - - **151**
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WATER—"Constructing waterworks"—Alteration of boundaries - - - **652**
See LOCAL GOVERNMENT. 2.

WATER RATE—*Lease—Covenant by Lessor for Payment of all Water Rate imposed or assessed upon the Premises—Water supplied for Domestic Purposes—Water supplied for Trade Purposes—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17)—*New River Company's Act*, 1852 (15 & 16 *Vict. c. clx.*), *ss.* 36, 38, 40.

Under a covenant by the lessor, in a lease, to pay "all water rate imposed or assessed upon the premises or on the lessor or lessees in respect thereof," the lessor is not bound to pay for water supplied by the water company to the lessees for trade purposes. *In re* FLOYD. FLOYD *v.* J. LYONS & Co. - - - - **C. A. 633**

WAY—Right of—Grant in gross—Covenant **528**
See EASEMENT.

—— Right of—Highway—Removal of obstruction - - - - - **35**
See LOCAL GOVERNMENT. 1.

WILL—*Conversion—Residuary Gift—Successive Interests—Leaseholds—Construction of Will.*

A testator directed that the rents and profits of his residuary real and personal estate should be paid to his wife for life; and after her death he gave his residuary estate to others in succession.

WILL—*continued.*

subject to certain annuities, and conferred on the annuitants a power of distress. The residuary estate included both freeholds and leaseholds:—

Held, that neither the direction to pay rents nor the power of distress afforded any sufficient indication of an intention that the leaseholds should be enjoyed in specie, and that they ought to be treated as converted at the expiration of a year from the testator's death in accordance with the rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137 a.

Craig v. *Wheeler*, (1860) 29 L. J. (Ch.) 374, approved and followed.

Crowe v. *Crisford*, (1853) 17 Beav. 507, *Wearing* v. *Wearing*, (1856) 23 Beav. 99, and *Vachell* v. *Roberts*, (1863) 32 Beav. 140, commented upon. *In re* Game. Game *v.* Young Stirling J. 881

2. —— *Forfeiture—"Bankruptcy"—Foreign Bankruptcy—English Domicil—Tenant for Life.*

The life interest of a domiciled Englishman under a trust by will determinable on bankruptcy or alienation:—

Held, not to be forfeited by an adjudication in bankruptcy made by the Supreme Court of New Zealand after the death of the testatrix, but subsequently annulled.

In re Blithman, (1866) L. R. 2 Eq. 23, followed.

In re Hayward. Hayward *v.* Hayward Kekewich J. 905

3. —— *Hotchpot Clause—Construction of Will.*

A father on the marriage of his son in 1885 covenanted with the trustees of the son's settlement that his executors should, within six months after his death, pay to them 10,000*l.*, to be held by them upon trust for the son for his life, with remainder to his wife for her life, and after the death of the survivor upon trust for the issue of the marriage, and in default of issue in trust for the father absolutely. The father died in December, 1886, having by his will given the residue of his estate upon trust for his son and his daughter in equal shares. The share of the daughter was to be held in trust for her and her children.

The will provided that any and all sums of money which the testator had already covenanted to give to or with any child of his on his or her marriage should be taken in or towards satisfaction of the respective share of such child, or the person or persons claiming under or in substitution for her or him, under the testator's will, and should be brought into hotchpot and accounted for accordingly.

After the father's death his executors paid 10,000*l.* out of his estate to the trustees of the son's settlement, and divided the residue of the father's estate equally between the son and the trustees of the daughter's settlement, treating the 10,000*l.* as part of the son's share. In 1894 the son died without issue:—

Held, by Chitty J., that (subject to the life interest of the son's widow) the 10,000*l.* was divisible in equal shares between the son's executors and the trustees of the daughter's settlement:

Held, by the Court of Appeal, that (subject to the widow's life interest) the son's executors were entitled to the whole of the 10,000*l.*

When a testator directs by a hotchpot clause that a fund in which he himself has an interest is to be taken by a residuary legatee as part of his share of the residue under the testator's will, the hotchpot clause operates as a gift to that legatee of the testator's interest in the fund. *In re* Cosier. Humphreys *v.* Gadsden C. A. 325

4. —— *Power—Gift to A. for Life—Power of Disposition by A. amongst a Class—Gift over in Default of Appointment—Gift by Implication—Power coupled with a Trust.*

Where there is a gift to A. for life with a power to A. to appoint among a class, but no gift to the class and no gift over in default of appointment, the Court is not bound, without more, to imply a gift to the class in default of the power being exercised.

In order to imply a gift there must be a clear indication in the will that the testator intended the power to be regarded in the nature of a trust, so that the class or some of the class should take.

A testatrix bequeathed to her husband a life interest in certain real property, and gave "him power to dispose of all such property by will amongst our children." The will contained no gift over in default of appointment. There were children, but the husband died intestate without having exercised the power of disposition:—

Held, that the power conferred on the husband was a mere power and not one coupled with a trust, and that consequently there was no gift to the children by implication, and that the heir-at-law of the testatrix was entitled.

Brown v. *Higgs*, (1799) 4 Ves. 708; *Burrough* v. *Philcox*, (1840) 5 My. & Cr. 73; *Re Caplin's Will*, (1865) 2 Dr. & Sm. 527; *Re White's Trusts*, (1860) Joh. 656, discussed, examined, and distinguished.

Healy v. *Donnery*, (1853) 3 Ir. C. L. Rep. 213, discussed and followed. *In re* Weekes' Settlement - - - Romer J. 289

5. —— *Uncertainty—Class—Member—Mistake—Gift of Residue to "the Children of the deceased Son (named B.) of my Father's Sister"—Several deceased Sons named B.—Construction of Will.*

A testator by will gave the residue of his real and personal estate "unto the children of the deceased son (named Bamber) of my father's sister share and share alike." There were three deceased sons all named Bamber of the sister of the testator's father, and this fact was known to the testator:—

Held, by the Court of Appeal (reversing the decision of Kekewich J.), that the gift was void for uncertainty.

Hare v. *Cartridge*, (1842) 13 Sim. 165, and *Lee* v. *Pain*, (1844) 4 Hare, 201, 249, commented on and distinguished. *In re* Stephenson. Donaldson *v.* Bamber - - C. A. 75

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